(32,403)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 163

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, ET AL., ETC., PETITIONERS,

vs.

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fols. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. Riggs, Henry B. Hutchins, Clarence C. Troup, Karl E. Lingren, George H. Logan, Victor R. Hess, N. Nelson Keen, B. Wheeler Dyer, and William V. Wood, Partners, Trading and Doing Business as Lamborn & Company,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

NOTICE OF MOTION FOR JUDGMENT—Filed April 7, 1921

To the National Bank of Commerce of Norfolk, Norfolk, Virginia, a corporation chartered and existing under the [fol. 2] laws of the State of Virginia, with its principal office and place of business in the city of Norfolk, in said State:

Take notice that the undersigned will move the District Court of the United States for the Eastern District of Virginia, at Norfolk, in its court room in said city of Norfolk, Virginia, on Monday, May 2, 1921, between the hours of 10:00 a. m. and 2:00 p. m. on that day, or as soon thereafter as it can be heard, for a judgment in its favor against you for the sum of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in

said letter set forth, the undersigned having sold and delivered one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents ($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit, amended as aforesaid, and in all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth, upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment whereof has been duly made, and payment whereof has been refused and declined. The amount in controversy in this cause, exclusive of interest and costs, ex-
[fol. 3] ceeds the sum of $10,000. You are a resident of the State of Virginia, and each of the undersigned is a resident of a state other than the State of Virginia.

Arthur H. Lamborn, a Citizen of New Jersey; Gerard P. Tameling, a Citizen of New York; Chas. C. Riggs, a Citizen of New Jersey; Henry B. Hutchins, a Citizen of New Jersey; Clarence C. Troup, a Citizen of New Jersey; Karl E. Lindgren, a Citizen of Pennsylvania; Geo. H. Logan, a Citizen of New Jersey; Victor R. Hess, a Citizen of New York; N. Nelson Keen, a Citizen of New Jersey; B. Wheeler Dyer, a Citizen of New York; William V. Wood, a Citizen of New Jersey, Partners, Trading and Doing Business as Lamborn & Company, by Baird, White & Lanning, Counsel.

IN UNITED STATES DISTRICT COURT

DENIAL OF LIABILITY AND PLEA OF GENERAL ISSUE—Filed April 11, 1921

The said defendant, The National Bank of Commerce of Norfolk, by its attorney comes and says that it did

not undertake or promise in the manner and form as the said plaintiffs have above hereof complained.

And of this the said defendant puts itself upon the country.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

STATEMENT OF GROUNDS OF DEFENSE—Filed May 3, 1921

And now comes the defendant, The National Bank of Commerce, of Norfolk, by counsel, and states that its [fol. 4] grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every the allegations contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defense which may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies and calls for strict proof of each and every item of the charge relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

Tazewell Taylor, P. d.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STATEMENT OF GROUNDS OF DEFENCE—Filed October 23, 1923

And now comes the defendant, The National Bank of Commerce of Norfolk, by counsel and states that its grounds of defence upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every allegation contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defence that may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies, and calls for strict proof of, each and every item of the charges relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which [fol. 5] is the subject of this action, so far as the same were to be kept and performed by them.

4. It relies upon the fact that the letter of credit, which is the subject of this action, contemplated the delivery by the plaintiffs of Java White Sugar, whereas the railroad bill of lading, together with other documents, tendered by the plaintiffs and upon which payment under the letter of credit was demanded, did not show a shipment of Java White Sugar, but on the contrary simply Java Sugar, there being at least fourteen varieties of Java Sugar.

5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

"Shipment to be made during August-September, 1920, at option of the sellers, from Java by Steamer or Steamers to Philadelphia."

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia.

6. It relies upon the fact that the plaintiffs having declared the "Chifuen Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had no authority to subsequently declare another vessel, even though said vessel complied in all particulars with the terms of the letter of credit so far as the time, place and

destination of the shipment was concerned, which said substituted vessel in this case did not comply with.

7. It relies upon the fact, in addition to all of the other [fol. 6] defences hereinabove made, that the sugar actually tendered was not shipped on the "West Cheswald" during the months of August-September, 1920.

Tazewell Taylor, Pd.

In United States District Court

Order Granting Leave to Amend the Notice of Motion for a Judgment—Filed November 19, 1923

On motion of the plaintiffs, leave is given them to amend the notice of motion for a judgment herein, and the same is accordingly amended so that said motion shall contain the averment that the National Bank of Commerce of Norfolk is chartered under the National Banking Laws of the United States, instead, as alleged in the notice of motion for a judgment, under the laws of the State of Virginia.

D. Lawrence Groner, United States District Judge.

In United States District Court

Minute Entry—November 19, 1923

This day came the parties by their attorneys, and the defendant for its plea says it did not undertake or promise in the manner and form as set forth in Plaintiff's notice of motion and of this it puts itself upon the country, and the Plaintiffs likewise, and issue is joined.

And thereupon from the jurors duly drawn and in attendance upon this term of the Court, came a jury of twelve, to-wit: L. R. Rawls, Rurick Nottingham, F. S. Hancock, H. C. Cooper, E. A. Watkins, Lawrence Tucker, J. G. Lohman, Samuel D. Hope, R. P. Bunting, R. O. Odom, C. H. Machen, and M. W. Ellis, and who having been as aforesaid duly elected and tried were sworn well and truly to try the issue joined, and having partly heard the evidence

[fol. 7] were adjourned until tomorrow morning at ten o'clock.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

VERDICT AND JUDGMENT—November 20, 1924

This day came again the parties by their attorneys, and the jury appeared pursuant to their adjournment on yesterday, and at the conclusion of all the evidence on behalf of the plaintiffs the defendant, by its counsel, moved the Court to direct a verdict in favor of the defendant, which motion being fully argued the Court doth overrule, to which ruling of the Court the defendant, by its counsel excepted, and at the conclusion of all the evidence the plaintiffs, by their counsel, moved the Court to direct a verdict in their favor, which motion being fully argued the Court doth sustain, to which ruling of the Court the defendant, by its counsel, excepted. And thereupon the jury, under the direction of the Court, returned the following verdict, to-wit: "We, the jury, under the direction of the Court, find for the plaintiffs and assess their damages at the sum of $48,009.81 with interest thereon from January 7, 1921, R. P. Bunting, Foreman, this November 20, 1923." And thereupon it having been agreed by counsel for the parties respectively, as appears from their signed stipulation filed and made a part of the record in this action, that the net sum derived from the proceeds of the sale of the sugar in question is $7,019.13, and that the said sum came into the possession of the plaintiffs on October 28, 1921, pursuant to the terms of the agreement entered into between the plaintiffs, the defendant, and T. S. Southgate & Company filed and made a part of the record in this action, and that the defendant should be credited with said sum as of October 28, 1921, it is considered by the Court that the plaintiffs, Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchins, Clarence C. Troup, Karl E. Lindgren, George H. Logan, Victor R. Hess, N. Nelson [fol. 8] Kenn, B. Wheeler Dyer and William V. Wood, partners trading and doing business as Lamborn and Com-

pany, do have and recover of and from the defendant, the National Bank of Commerce of Norfolk, a corporation, the sum of $48,009.81 with interest thereon at the rate of six percent from January 7, 1921, subject to a credit of $7,-019.13, as of, and with interest thereon at the rate of six percent from October 28, 1921, together with costs. And thereupon the defendant, by counsel, having intimated an intention to apply for a writ of error and supersedeas to the judgment aforesaid, leave is granted it to file its bill of exceptions within ninety days from this date, and the penalty of the supersedeas bond, if any, to be given on behalf of the defendant, is hereby fixed at the sum of Fifty Thousand Dollars ($50,000.00), the surety or sureties upon said bond to be approved by this Court or the Judge thereof.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILLS OF EXCEPTION—Filed February 11, 1924

This day came defendant by its attorney, and in pursuance of the leave heretofore granted it, tendered its bills of exception, which were received and considered by the Court and ordered to be made a part of the record.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

Bills of Exception—Filed February 11, 1924

CAPTION

Be it remembered, That upon the trial of the case the parties upon the part of each, respectively, to maintain the issues joined, introduced the following evidence, and the exhibits referred to therein and attached thereto, the originals of which said exhibits are to be by the Clerk of [fol. 9] this Court, pursuant to agreement between the parties, and in accordance with the rules and practice of

this Court and of the United States Circuit Court of Appeals for the Fourth Circuit, certified and sent to the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond.

Evidence on Behalf of Plaintiff

The plaintiff offered in evidence the letter of credit dated May 11th, 1920, numbered 105, issued by the National Bank of Commerce to Lamborn & Company for the sum of $53,123.84, which was marked "Plaintiff's Exhibit No. 1", and is here copied, as follows:

Plaintiff's Exhibit 1

"The National Bank of Commerce of Norfolk, Norfolk, Virginia

Letter of Credit. No. 105

May 11, 1920.

Lamborn & Company, 132 Front St., New York:

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three thousand one hundred twenty-three Dollars and eighty-four cents ($53,123.84).

Covering: 1,000 bags (of about 224 lbs. each) 10 percent more or less Java White Sugars at 22 cents per pound, [fol. 10] less 2% duty paid f. o. b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in force January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, com-

municat*ion* with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly, A. E. Wharton, Ass't Cashier."
Cashier."

The plaintiff offered in evidence a modification of the letter of credit dated July 15th, 1920, as Plaintiff's Exhibit No. 27, which was then marked "Plaintiff's Exhibit No. 2", and is here copied as follows:

PLAINTIFF'S EXHIBIT 2

"The National Bank of Commerce of Norfolk, Norfolk, Virginia

Foreign Exchange Dpt.

July 15, 1920.

The Bankers Trust Co., New York City.

GENTLEMEN: We beg to revert to our letter of credit No. 105, dated May 11th in favor of Messrs. Lamborn & Co. [fol. 11] for $53,123.84, and to say that we have been authorized by our clients, Messrs. T. S. Southgate & Co. to eliminate the requirement of the copy of ocean bill of lading covering shipment from Java to Philadelphia. All other terms and conditions in the credit to remain as heretofore.

We will be pleased to have you advise Messrs. Lamborn & Co. that this requirement had been eliminated.

Yours very truly, A. E. Wharton, Ass't Cashier."

W/M.

The plaintiff offered in evidence a letter dated July 16th, 1920, from the Bankers Trust Company to Lamborn & Company as Plaintiff's Exhibit No. 28. This letter was marked "Plaintiff's Exhibit No. 3" and is here copied as follows:

PLAINTIFF'S EXHIBIT 3

"New York, July 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

GENTLEMEN: Re Credit No. 105 dated May 11th, in your favor, issued by National Bank of Commerce, Norfolk, Va.

We refer to your letters of June 10th and 15th on this subject and now advise you that we have received a letter from the National Bank of Commerce, Norfolk, Va., stating that they have been authorized by their clients, T. S. Southgate & Co., to eliminate the requirement of an ocean bill of lading showing shipment from Java to Philadelphia, of which please take note.

All other terms and conditions of this credit are to remain unchanged.

Very truly yours, C. F. Bain, Asst. Manager."

The plaintiff offered in evidence a letter of July 17th, [fol. 12] 1920, from National Bank of Commerce to Lamborn & Company, which was marked "Plaintiff's Exhibit No. 4" and is here copied as follows:

PLAINTIFF'S EXHIBIT 4

"Norfolk, Va., July 17, 1920.

Messrs. Lamborn & Co., New York City.

GENTLEMEN: Reverting to your letter of July 9th, we would advise that we have requested the Bankers Trust Co. of New York to eliminate requirement in our Credit No. 105 for copy of ocean bill of lading covering shipment from Java to Philadelphia. We have requested the Bankers Trust Co. of New York to notify you of the elimination of this requirement.

Yours very truly, A. E. Wharton, Ass't Cashier."

W/M.

It was stipulated between counsel that Mr. A. E. Wharton, Assistant Cashier of National Bank of Commerce had due authority to sign the above set forth letter of credit.

OFFERS IN EVIDENCE

The plaintiff offered in evidence the deposition of G. Alting du Cloux, together with a stipulation between counsel that in the taking of the testimony of this witness a photostatic copy of the bill of lading might be used, and also offered the original bill of lading, which bill of lading was marked "Plaintiff's Exhibit No. 6."

The plaintiff offered in evidence the photostatic copies of railroad bills of lading as "Plaintiff's Exhibit No. 7," which were dated December 17th, 1920.

[fol. 13] The deposition of G. ALTING DU CLOIX is as follows:

My name is G. Alting du Cloix. I am forty-two years of age and reside in Batavia, at Museumlaan 12. I am a partner of the firm of J. C. Van Rossen and Company, Steamship Agents in Batavia, Semarang and Soerabaya.

Shortly prior to and subsequent to September 30th, 1920, my place of residence was Batavia. I was employed by Francis Peek and Company, Limited, as Manager of the Shipping Department. I remember that in September, 1920, the Steamship "West Cheswald" was loaded by the Nederlandsch Maatschappij voor Overzeehandel, who were the shippers of certain sugar. I do not know who the consignee of the sugar was. The signature on the photostatic copy of an ocean bill of lading of the Steamship "West Cheswald," dated at Semarang, Java, September 30th, 1920, is my own. I signed that bill of lading on September 30th, 1920, at the instance of the shippers, on the authority that I had from Francis Peek and Company, Limited, to sign the bill of lading as Manager of the Shipping Department. It was signed on behalf of Francis Peek and Company, Limited, and I signed it in the name of Francis Peek and Company, Limited, as agents for the United States Shipping Board, Emergency Fleet Corpora-

tion, United American Lines, Incorporated, Successors to Independent Steamship Corporation, Agent.

I handed the original bill of lading over to the shippers against payment of freight and against letter of guarantee of the shippers according to which they promised to deliver to the steamship agents the mate's receipts signed by the captain of the Steamship "West Cheswald" as soon as those mate's receipts came to hand to them from Semarang. The captain signed the mate's receipts in Semarang as soon as the cargo was taken over. Those mate's receipts were handed to the shipper to send them to Batavia and deliver them to the steamship agents here in exchange for the bill of lading and the letter of guarantee.

The mate's receipts are receipts signed by the captain declaring having received on board the cargo mentioned therein.

During the time the "West Cheswald" was loading sugar [fol. 14] in Java, it happened that steamers arrived after the date specified in the contract of purchase between shippers and consignees, that is such steamers were to be loaded before a certain date. Bills of lading were given by the steamship agents, bearing a date of shipment falling within the shipping period stated in the contract of purchase. On account of a heavy fall in prices of sugar during the month of September, 1920, the purchasers endeavored wherever possible to cancel contracts and for that purpose investigated carefully the dates of departure of the steamers, but in the case of the "West Cheswald" the loading actually began, I believe, on the 28th of September, 1920. It is so long ago that I cannot remember the date exactly but the fact is loading was begun in time so that by greatest effort and by loading at night, the loading of the cargo in question was completed on September 30th, 1920."

Counsel for the plaintiff then offered in evidence those portions of the following depositions relating to the S/S "West Cheswald" and her cargo.

WILLIAM H. LIGNANTE, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My full name is William H. Lignante. I am twenty-nine years old and reside at 15 Bay 17th Street, Brooklyn, New York.

I am Sugar Traffic Manager of Lamborn & Company, New York. I have been employed in that capacity for about three years and was so employed in the summer and fall of 1920. As Traffic Manager, in the fall of 1920, when we had notice that a vessel would carry certain quantities of sugar aboard, we would apportion the sugars to the various buyers according to declarations made, and cause to have made up the railroad bills of lading covering these shipments, and proceed to the port or ports where the ships came in and see to it that the duties were paid thereon, and then proceed to the pier to observe the discharge of the sugars and see to the [fol. 15] placing of the various shipments on board cars, and see to the signing and delivery to us of the various railroad bills of lading for the various shipments.

I remember the arrival of the Steamship "West Cheswald." She arrived in this country on December 16th, 1920, and entered at Philadelphia. That was the port of her original entry on the voyage in question. I saw the unloading of that part of the cargo of the "West Cheswald" which was consigned to Lamborn and Company, with the exception of about 800 bags. I saw it at Pier 56, South Philadelphia. I got to the Pier about two hours after the arrival of the ship. She had unloaded about 800 bags of Lamborn & Company's shipment before I got to the Pier. Altogether she carried for Lamborn & Company 34,666 bags. I stood by and supervised the sugars as they were coming out of the hold of the West Cheswald and delivered to the stevedores on the pier, who in turn turned them into the railroad cars. These railroad cars were ordered into the pier by me, weighed light in order to avoid delay in shipment, and facilitate the weighing of the sugars, and sugars were being checked out by our men on the pier, our weigher and sampler, who obtained samples of the sugars as they were being loaded into the railroad cars.

The railroad cars were then checked back again by the railroad company, sealed by the railroad company and drawn out on the railroad track scales. There the cars were weighed by the United States Government Weigher, railroad weigher and our private weigher, to obtain the landed weights. Then I obtained the railroad bills of landing and forwarded them on to the New York office for the various shipments.

I have been superintending the unloading and shipment of Java White sugar for Lamborn & Company for about a year. During that time I have handled approximately 30,000 tons in the course of my employment. Samples of cargoes of Java white sugar are taken by Lamborn & Company and they were so taken of the cargoes that I have referred to in my preceding answers. In no case was the taking of such samples omitted. I made a personal examination of the quality of the sugar in the aggregate amount of shipments that I referred to, and in the course of my employment became familiar with the quality and [fol. 16] grade of Java White Sugar. Samples were taken of the Java White Sugar consigned to Lamborn & Company, carried by the West Cheswald. I saw those samples and was present when they were actually taken from the bags. I examined the sugar which was taken out for the samples, and the sugar carried by the West Cheswald consigned to Lamborn & Company was a very good grade of Java White Sugar above the best Dutch standard 25. The bags and their contents were in good physical condition.

Robert A. Wabrauschek, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My name is Robert A. Wabrauschek, aged twenty-two, occupation, chief clerk of the Admiral Line, Pacific Steamship Company, New York City, Office, 17 State Street; residence, 13 Charles Street, New York City.

(Note.—Counsel hands witness paper, which he states he is familiar with and is marked "Plaintiff's Exhibit 8 for identification.)

I entered the employment of the Admiral Steamship Company September 1919. Originally I was clerk in the dock offices in Seattle, and cashier on another dock, and then I was transferred here as chief clerk.

I know that Francis Peek & Company, Limited, are a firm of ships' agents operating in Semarang, Batavia and Soerabaya, and they have acted for some of our steamers as ships' agents. They wouldn't really be steamers of the Admiral Line proper. They would be steamers of the Barbour Steamship Lines. We acted as their Pacific agent and they have been handling the Barbour Steamship steamers in the Far East. We also acted as agents for Tracy Steamship Company. They don't oridinarily have steamers in that trade, but in this case of the West Cheswald we acted as agents for the Tracy Steamship Company, that is, the Admiral Line did, and we acted in that capacity in connection with the Steamship West Cheswald. [fol. 17] It appears that the Shanghai office of the Admiral Line employed Francis Peek & Company to act as steamer agents of the West Cheswald. It is a fact that the Admiral Line was the agent for Tracy & Company in respect to the West Cheswald.

On and after September, 1920, I was acting as an employee of the Admiral Line at 17 State Street, New York City. Hugh Gallagher was our general Eastern agent in New York at that time and if there were any communications regarding the Steamship West Cheswald after September 30th, 1920, they passed through his hands.

I have here from the files of the Admiral Line communications regarding the said Steamship.

(The witness produces a copy of cablegram dated at Seattle, October 18th, 1920, a copy of which has been made and compared by the notary taking this deposition, and it is attached to this deposition and marked "Plaintiff's Exhibit 9 for identification.")

(Witness also produces a copy of a letter, dated at Shanghai, September 11th, 1920, addressed to E. F. Townsend, Agent, Admiral Line, purporting to be signed by G. A. Heyburn, Assistant Manager, a copy of which has been made and compared by the Notary taking this deposition and is attached to this deposition and marked "Plaintiff's Exhibit 10 for identification.")

The copy of the cablegram bears a stamp "Pacific Steamship Co., October 25th, 1920, time New York Office." That stamp is used in the New York office of the Admiral Line. The Pacific Steamship Company is the corporate name, while the Admiral Line is the trade name under which we operate. They are the same thing.

The date in this stamped notation on said Exhibit indicates that the cablegram referred to was received in the New York office of the Admiral Line on October 25th, 1920. This is the very copy that was received.

[fol. 18] PLAINTIFF'S EX. 9 FOR IDENTIFICATION

Feb. 10/1922HCD

(Copy)

"Form 2294-3.15.1920. 3M

For Your Information
Translation of Cablegram from the Admiral Line

Pacific Steamship Co. Oct. 25, 1920, time filed.
P. S. S. Co.
Pacific Steamship Company, New York Office.
Signed by: Admiral Line.
Place and Date: Seattle, October 18, 1920.
Addressed to: Admiral Line, Shanghai.
Copies to: R.D.P.—Action H. G. Information.
No. 257, 18th October.

X West Cheswald:

Referring to your telegram 15th October Barber S S Lines Inc regarding Francis Peek & Co. appointing agents Colombo steamer left in your hands instruct Peek all matters."

I know that signature on the letter dated Seattle, October 6th, 1920, addressed to Mr. E. J. Griffith. It reads R. D. Pinneo. It is not his personal signature but was signed [fol. 19] by Mr. Eaton. Mr. Eaton was Mr. Pinneo's as-

sistant. I have met Mr. Pinneo but I did not know Mr. Eaton. The letter has a stamp or receipt by the Pacific Steamship Company, dated October 12th, 1920 (a copy is made by the Notary and attached to this deposition marked "Plaintiff's Exhibit 11" for identification, reading as follows):

"PLAINTIFF'S EXHIBIT 11 FOR IDENTIFICATION—Feb. 10, 1922. H. C. T.

The Admiral Line Foreign Department Pacific Steamship Co.

Oct. 12, 1920, New York Office. Seattle, Wash., Oct. 6, 1920.

Mr. E. J. Griffith, Asst. Gen. Eastern Agt., New York, N. Y.

DEAR SIR:

S. S. "West Cheswald"

Referring to your telegram of day or two ago, inquiring with reference to the West Cheswald:

I enclose copy of letter of September 11 from Mr. Heyburn to Mr. Townsend, which has just been received here, showing that this steamer left Shanghai September 11 for Samarang, Java, evidently to load for Europe.

As I wired you, I was under the impression that this ship had been substituted for a Barbour ship to take the Java-European berth, having noted some telegrams exchanged between Shanghai and Barbours to this effect. I presumed, of course, that Barbours had made this arrangement with Tracy & Co. and that Tracy & Co. were fully advised as to the movement of their steamer.

I shall be interested to learn what you have developed since you discussed the matter with the Barbour Line.

Yours very truly, R. D. Pinneo, Manager Foreign Department."

E/R.

[fol. 20] The letter offered in evidence (Exhibit 11 for identification) shows as having attached to it a letter dated September 11th, 1920, Shanghai, which I now find attached in the file, reading as follows:

"PLAINTIFF'S EXHIBIT 10 FOR IDENTIFICATION—Feb. 10, 1922. H. C. T.

Shanghai, September 11, 1920.

Mr. E. F. Townsend, Agent Admiral Line, c/o Syme & Co., Singapore.

DEAR SIR:

S. S. "West Cheswald"

This steamer is leaving Shanghai today for Samarang and we enclose herewith a list of Charts required by the Master for his voyage to Europe.

Will you please obtain these Charts promptly and communicate with Messrs. Francis Peek & Company and find out position of vessel and where it is possible to send these Charts to him so that they will safely arrive.

This is an eleventh hour fixture although the "West Cheswald" was scheduled some three weeks ago to go to Java. Francis Peek at the last minute cabled us to fix her elsewhere if possible and we have been communication with Barber Steamship Lines and Francis Peek & Company with result that we received an urgent cable yesterday to send steamer to Java.

Please do all possible to assist the Captain in obtaining these Charts.

Yours truly, (Sg.) G. A. Heyburn, Assistant General Agent."

GAH/AFH.

[fol. 21] FRANCIS C. GAWEL, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My age is twenty-seven years. I live in Richmond Hill, Long Island, and I am a clerk for M. H. Tracy & Company, Incorporated, which Company is also known as the Tracy Steamship Company. I have been in their employment approximately three years. I was in the United States Service during the war and returned to their employment in August, 1919, and have been in their employment

without interruption since that time, with the exception of three or four months from June to October, 1921, at which time I was loaned by them to another transportation concern.

During September, October, November and December, 1920 I was acquainted with Pacific Steamship Company, whose trade name I believe is the Admiral Line.

The Tracy Steamship Company were the agents for the Steamship "West Cheswald" and as a part of my duties I had certain functions to perform for that steamship. The Tracy Steamship Company were the agents for the Shipping Board at New York. They appointed other agents in respect to the "West Cheswald", namely the Admiral Line on the West Coast and in the Far East.

The Tracy Steamship Company knew that the Admiral Line had appointed Francis Peek & Company, Limited the agents for this steamship in the Far East.

I have seen the copy of the ocean bill of lading which yau hand me marked "Plaintiff's Exhibit 8 for identification." It is an ocean bill of lading for the "West Cheswald", in the name of Francis Peek & Company, Limited, Agents. I cannot read the name in handwriting beneath the stamped name of Francis Peek & Company, Limited. Our company has had communication with Francis Peek & Company through the Admiral Line, but I have never seen other shipping documents stamped Francis Peek & Company, like the one before me.

(NOTE.—Witness here produces a non-negotiable copy of "Plaintiffs' Exhibit 8" for identification of this date, [fol. 22] and the paper produced by the witness is marked "Plaintiffs' Exhibit 12 for identification." It is ruled that a photographic copy of said Exhibit 12 be attached to this deposition in place of the original.)

I obtained this Plaintiffs' Exhibit 12 for identification from our agents, Charles T. Megee Company, Drexel Bldg., Philadelphia, Pa. It is a non-negotiable copy of an ocean bill of lading.

I had a telephone conversation with Mr. B. W. Dyer, a member of the firm of Lamborn & Company, concerning the Steamship "West Cheswald," Mr. Dyer asking me whether we would consider sending the West Cheswald to Philadelphia instead of New York. I told him, as far as

I can remember, that it would all depend on how Lamborn & Company's sugar was stowed, and to obtain this information I radioed the Master at his request. The radiogram read as follows: "New York, December 11, 1920, 12:30 P. M. Master steamer West Cheswald. Radio immediately amount general and sugar aboard how stowed and if sugar Lamborn can be discharged without moving other cargo." He replied as follows: "December 11, 5:35 P. M., 1920, 2,700 tons general cargo Nos. 1, 2, 4, 5 hatches including 1,100 tons sugar marked SZK optional Delaware Breakwater for which has no manifest bills of lading neither for cargo loaded at Sourabaya Lamborn sugar available without moving other cargo and must be discharged first ship due about December 14, A. M."

The words "1,100 tons marked SZK, optional Delaware Breakwater for which has no manifest bills of lading neither for cargo loaded at Surabaya" in the Captain's radiogram do not refer to the 34,666 bags of sugar on the West Cheswald consigned to Lamborn & Company. I do not know the approximate place on the high seas of the West Cheswald at the time of the sending by the Captain of the above radiogram, but according to the radiogram it was via Bermuda and Barrington Pass. I believe a radio message on board of one of these steamers of the size of the West Cheswald can be sent for a distance of approximately 500 miles. Our message had been directed by wireless by way of Punta Delgada Azores. I do not know whether or not the West Cheswald was [fol. 23] making the southerly route and I have not learned. Unofficially the fact that the reply came from Bermuda and the message was sent by the Azores would indicate that she was. Whether or not sugar ships from Java took the southerly course was entirely in the discretion of the master. It was necessary for them to stop at coaling stations to replenish their bunkers. Of course it all depends on how much cargo she has on board and how much bunker she can take. If the cargo is very small she could undoubtedly bunker at Java and proceed direct to a United States port without rebunkering, by going West through the Indian Ocean, Suez Canal, Red Sea, Mediterranean and by Gibraltar. The customary route of these ships is by Gibraltar because the distance is shorter.

I have not learned the distance from the Atlantic Coast that the West Cheswald was at the time of our radiogram. Our next step after receiving the Captain's radiogram was an immediate communication with United States Shipping Board by telephone. I told the Shipping Board the contents of the Captain's radiogram, and asked if they would consider sending the West Cheswald to Philadelphia instead of New York. They authorized me to divert this steamer to Philadelphia at an additional freight charge of $1.00, which charge was to be made against Lamborn & Company. By telephone I communicated with Lamborn & Company, talking to a man who gave his name as Mr. Dyer. He said that he would consult with his company and let me know. Afterwards he telephoned me and said to go ahead and divert the steamer to Philadelphia, that his company was agreeable to paying the extra $1.00 per ton freight. He subsequently confirmed this by letter reading as follows:

"New York, December 13, 1920.

Lamborn & Company, 132 Front Street; Tracy Steamship Company, 17 State Street, New York City.

GENTLEMEN: Confirming telephone conversation of this afternoon with Mr. Gawell in reference to our conversation with Mr. Sinclair of the Shipping Board, we herewith authorize you to divert the SS. West Cheswald to Phila- [fol. 24] delphia and advise you that on account of such diversion we agree to pay $1.00 per ton bill of lading weight excess freight on the quantity of about 3,572 tons of Java White Sugar, which are coming to us on this boat.

This letter is written in duplicate and your acceptance of the attached copy constitutes our agreement.

Thanking you for your cooperation in this matter, we beg to remain,

Yours very truly, Lamborn & Company. (Signed) B. W. Dyer."

Upon receipt of this confirmation I immediately radioed the master as follows:

"New York, December 13th, 1920.

Master Steamer West Cheswald, from Punta Delgada, December 3, via New York Radio:

Proceed Philadelphia reporting Megee acknowledge Tracio."

He replied as follows:

"Steamship West Cheswald, via Pt. New York, December 14, 1920; Tracio, New York:

West Cheswald proceeding Phidalephia as per instructions Master."

I note from the rear side of the radiogram received that it gives two hours as its time of receipt on December 14th as follows: "December 14 A. M. 2:10; December 14 A. M. 3:17."

I do not know on what date the West Cheswald docked at Philadelphia, but we received a further radiogram from the master while en route there reading as follows:

"Dated December 15, 12:17 P. M. SS. West Cheswald via United States Philadelphia Penn. 15 Tracio New York. West Cheswald arrived Delaware Breakwater midnight. Master."

[fol. 25] The average speed of the steamer on this voyage was about nine knots. I would say that taking into consideration the dates of the radiograms, the fact that he was proceeding to Philadelphia, and his average speed the diversion of the ship to the Port of Philadephia did not delay her arrival and docking.

I rendered a bill to Lamborn & Company for the additional freight charges reading as follows:

"New York, December 16th, 1920.

Lamborn & Company, New York, to M. H. Tracy & Company, Inc., Debtor

West Cheswald No. 1

Extra freight due on account of diverting above steamer from New York to Philadelphia as per your letter of agreement dated December 13th, 1920, 3,572 tons of sugar (Java) at $1.00 per ton, $3,572.00."

I also sent a letter with this invoice as follows:

"December 16th, 1920.

Messrs. Lamborn & Company, New York City.

Attention Mr. Dyer. SS. West Cheswald

GENTLEMEN: We enclose herewith our invoice covering extra freight due the above steamer on account of diversion from New York to Philadephia.

Will you kindly let us have your check to cover and much oblige.

Very truly yours, Tracy Steamship Company, Inc., per Francis C. Gawel.

(By hand.)"

The amount of this invoice was paid to Tracy Steamship Company by Lamborn & Company on or about December 16th, 1920.

[fol. 26] JAMES LUTZ, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I am a sugar weigher employed by George J. Hoffman & Company, and I reside at 1711 East Moyamensing Ave., Philadelphia.

I have been a sugar weigher for about fifteen years, and in my present employment for about four years. My office is 80 Wall Street, New York City, although I am now stationed in Philadelphia. I was in Philadelphia in the month of December 1920 and know of the plaintiff Lam-

born & Company and of Mr. William H. Lignante. I saw the Steamship "West Cheswald" there at Pier 56 South Wharves. Her cargo consisted of white sugar, at that time on Pier 56 and coming from the ship. We weighed the bags as they came out. Mr. Hamann from Hoffman & Company and myself weighed nearly the whole cargo.

On the 17th of December, 1920, we weighed a lot of 1000 bags for T. S. Southgate & Company. The only orders that we received were to weigh 1000 bags for them. On Mr. Lignante's orders we did the weighing on the railroad scales which were about two blocks away from the pier. The bags were marked N M V O. A United States Government Officer and the railroad weigher assisted us. We weighed the whole car at one time. That is, we light weighed the car first, then we loaded it with sugar, then weighed it again and deducted the tare, that is, the weight of the car from the gross weight, and then deducted the tare of the bags.

The only record I made of the weighing of the 1000 bags for T. S. Southgate & Company is contained in this book.

(The book is marked for identification Plaintiff's Exhibit 13.)

The page headed "T. S. Southgate & Company, Norfolk, Va." is in my handwriting and those figures represent 1000 bags and represent the weight of 1000 bags of Java white sugar weighed by us for T. S. Southgate & Company on December 17th, 1920. They show the gross weight, [fol. 27] but not the net weight. It shows the net weight of the bags but not the net weight of the sugar. The net weight of the sugar weighed for T. S. Southgate & Company was 222,680 lbs. and that was the correct weight taken by Mr. Hamann and myself. I saw it all taken. We took 5% of the 1000 bags, that is fifty bags to arrive at the tare for the load. We obtained the tare by dumping the bags on the pier and then shovelling up the sugar and putting it back again after we tared the bags. I saw the sugar loaded into railroad cars T. & N. O. 331,041, 330 bags; M. St. P. & S. M. 36470, 335 bags and C. R. I. & P. 40979, 335 bags. Afterwards I made the entry of the weights on the book. I gave the book to Mr. Hamann and I have not seen it until this morning when Mr. Hurley of George J.

Hoffman's office gave it me. All of the handwriting headed "T. S. Southgate" on the page in the book marked "Plaintiff's Exhibit 13, April 10th, 1922," above the words "tare 2.60" and all the figures on the page are in my handwriting. Those entries were made on December 17th, 1920, just as I entered the weights. The words "tare 2.60" are in Mr. Hamann's writing.

(NOTE.—Plaintiff's Exhibit 13 offered in evidence photograph copy of that page to be attached to this deposition, and original produced at the trial.)

JOHN BOHAN, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

My residence is 110 Sussex Street, Jersey City, N. J., and I am employed by Lamborn & Company as a sugar sampler, 132 Front Street, New York City. I have been in their employ for about eight years and had been engaged in sampling Java white sugar for about two years previous to December 20th, 1920. Up to that time I had examined about 200,000 bags. In December 1920 I was in Philadelphia, sampling the Java white sugar from the Steamship West Cheswald at Pier 56, South Wharves, Philadelphia, Penn. I sampled during that month 1,000 bags for T. [fol. 28] S. Southgate & Company, the work being done on the 17th of December, 1920, on the pier while the sugar was going into railroad cars, the cars being marked "Southgate & Company." Mr. Nolan and Mr. Teehan assisted me in sampling the 1,000 bag lot for T. S. Southgate & Company. Each of us sampled a car, that is sampled the sugar going into the car, there being three cars loaded with the Southgate lot. I mixed all of the samples. We had a sort of gimlet that we put into a bag, drew a sample of sugar out of each bag, put it into a large paper bag, and when the job was finished the sugar was taken and mixed and two tins of about one pound each shipped to New York. I took a sample out of each bag that went

into the car that I was working on and mixed all of the samples together. The samples from all three cars were mixed together and this mixture from the 1,000 bags was shipped to New York, parcel post. They were put into two tins and both tins had the same quality of sugar. The sugar was found to be in good condition. It was Java white sugar above the Dutch Standard 25. The bags were perfectly dry.

The tin that you show me is one of the tins into which we put a sample of the sugar taken from the 1,000 bag lot for Southgate & Company and the label on that tin is in my handwriting.

(Plaintiff's Exhibit 14 for identification.)

I mailed that tin to Lamborn & Company, New York and have not seen it until this morning in Mr. Van Doren's office where it was handed me by Mr. Nelson Keen, one of the plaintiffs.

This is a report that I made of the quality and condition of the sugar sampled for T. S. Southgate & Company.

(Marked Plaintiffs' Exhibit 15 for identification.)

It is my signature on the report, the last one over the word 'sampler.'' The words ''Sound—all'' apply to the condition of the bags of sugar of T. S. Southgate & Company, as *due* the words ''damaged—none.'' I was in Philadelphia in February, 1921, sampling sugar from the Steamship ''Chifuku Maru'' and sampled a cargo of sugar on that ship consigned to Lamborn & Company. All that [fol. 29] sugar was in good condition, Java white sugar above the Dutch Standard 25.

At that time I had been sampling Java white sugar for about two years and had sampled over 200,000 bags. I think I sampled about 40,000 bags of Java white sugar on the Steamship ''Chifuku Maru''. The sugar on that ship was of about the same quality as the sugar on the ''West Cheswald''.

JOHN TEEHAN, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I live at 329 Bergen Street, Brooklyn, and am employed by George J. Hoffman & Company as a sugar sampler, in which capacity I have been employed for about seven years.

Up to January 1st 1921, I had sampled approximately 100,000 bags of Java white sugar. In December, 1920 I was in Philadelphia working for Lamborn & Company on a cargo of Java white sugar which came to Philadelphia on the Steamship "West Cheswald" and was at Pier 56 South Wharves. On December 17, 1920, at that time and place I was sampling bags of white sugar for T. S. Southgate & Company. I sampled all of the bags that went into one railroad car marked "T. S. Southgate & Company, Norfolk, Va." I do not remember the number of the car. I took a sample of sugar from each bag with a tryer while the bags were going into the car, put the samples in a bag and turned the bag over to Mr. Bohan. Mr. Bohan mixed them up together with the samples that he and Mr. Noland had drawn from the other bags that were going into the cars of T. S. Southgate & Company, and then he put a portion of that mixture in two cans, sealed them up and shipped them to Lamborn & Company, New York.

Plaintiffs' Exhibit 14 for identification is one of the cans that Mr. Bohan put some of the samples into and shipped to New York. I last saw it at Pier 56, South Wharf, Philadelphia, Pa., at which time it was sealed around the top.

From my examination of the quality of sugar in the [fol. 30] 330 bags that I sampled I would say that it was all free running Java white sugar in good condition, above the Dutch Standard 25. The bags were in good condition, marked N. M. V. O. Java.

JOHN F. NOLAN, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I am employed by George J. Hoffman & Company, 80 Wall Street, New York, and have been employed by them for the past ten years as a sugar sampler, licensed by the New York Coffee & Sugar Exchange, New York. Up to January 1st, 1921, I had sampled from 200,000 to 300,000 bag of Java white sugar and am familiar with the grades and varieties of Java white sugar.

In December, 1920 I was in New York and Philadelphia and when in Philadelphia I was at Pier 56, South Wharves, sampling a cargo of sugar from the Steamship West Cheswald. I was sent thereby Mr. Hoffman to sample sugar for Lamborn & Company going to different consignees. I sampled the sugar on the dock going into the car marked "T. S. Southgate & Company, Norfolk, Va." I sampled about 330 or 335 bags, that is, one railroad carload. By drawing a tryer full of sugar from each bag, comparing this with the Dutch Standard 25 which we had, I saw that it went above the Dutch Standard, and I put the sugar in a bag and turned the bag over to Mr. Bohan. The bags were marked "N M V O Java."

Mr. Bohan emptied the bags upon a mixing table with the sugar which he and Mr. Teehan had drawn from bags which were going to T. S. Southgate & Co. and mixed it thoroughly. He then put a portion of the sugar into two tins which he labeled and sealed.

Plaintiffs' Exhibit No. 14 for identification is one of the cans into which Mr. Bohan put part of the sugar which he mixed. I last saw that can on December 17th, 1920, at Pier 56, Philadelphia, at which time it was full and sealed around the top. It is now not full and unsealed. At the time that I sampled the sugar going to T. S. Southgate & Company from the Steamship West Cheswald at Phila-
[fol. 31] delphia, it was all above the Dutch Standard 25 and the bags were in good condition, all free running white Java sugar."

WILLIAM O'NEIL, being duly sworn, and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I live at 9 Gates Avenue, Brooklyn, and am employed by Lamborn & Company and have been employed by them as a sample room clerk and in different positions for over three years.

In December, 1920, I was a clerk in charge of the sample room of Lamborn & Company. The can marked "Plaintiffs' Exhibit 14 for identification" was received about December 20th, 1920. I took a sample of the sugar out and filled a sample bottle with it and sealed the bottle and put a label on it, the same label that was on here (indicating Plaintiffs' Exhibit 14 for identification). When I received the can it was sealed around the top with paper and I broke the same.

The bottle here is the one that I filled from the can marked 'Plaintiffs' Exhibit 14 for identification.' I wrote the label on the bottle marked 'S S West Cheswald N M V O Java sample one of 1,000, total 1,000 bags T. S. Southgate Company, Lamborn & Company, Pier 56, Philadelphia, Pa.', the date '12/17/20'.

I sealed the bottle and locked it up in the sample room of Lamborn & Company from which it was brought today. I filled the bottle about December 20th, 1920, and dated the label December 17th, 1920, representing the date sample was taken."

FREDERICK A. HAMANN, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

My residence is 7025 Third Avenue, Brooklyn. I have been employed by George J. Hoffman & Company, 80 Wall Street, New York City for about fifteen years. I am the Philadelphia representative and sugar weigher in charge of the Philadelphia office. I was in charge of the [fol. 32] Philadelphia office in December, 1920, and was

general overseer of the weighing of the cargo of the West Cheswald.

The words "tare 2.60" on page marked "Plaintiffs' Exhibit 13 for identification" of April 10, 1922 are in my handwriting, as are the words "December 17th" at the bottom of the page. The words "tare 2.60" represent the tare of each individual bag, that is the weight of the empty bags. I worked with James Lutz in taking the tare of that shipment. We dumped one bag into another until we obtained the full quota of 50 bags which represented 5% tare of 1,000 bags. The 50 bags were weighed and the weight of same designated the tare of 1,000 bags. The fifty bags were weighed together, the weight being divided by 50, giving a tare of 2.60 per bag.

The words "Dec. 17th", represent the date of weighing, and the words written on that page "tare 2.60" and "Dec. 17th", were written on December 17th, 1920, and the book was given to me on that date and mailed to George J. Hoffman & Company, 80 Wall Street, New York City. I have not seen the book since that time until today.

WILLIAM H. LIGNANTE, being recalled on behalf of the plaintiffs, testified as follows:

By Mr. McNevin:

In December, 1920, I was employed by Lamborn & Company as Traffic Manager of the sugar department and during that month was both in New York and Philadelphia. On December 17th or about that date I was in Philadelphia where I ordered our weighers to weigh out 1,000 bags of sugar and have them loaded in cars at the pier for T. S. Southgate & Company's account. The weighers were George J. Hoffman & Company, their representatives being Fred Hamann and James Lutz. I saw to it that the 1,000 bags were property loaded into the railroad cars designated for the T. S. Southgate & Company shipment and saw to it that the check for the number of bags in each car was correct, and also observed Mr. Hayes of the Pennsylvania Railroad Company sealing the cars. The T. S. [fol. 33] Southgate & Company shipment was loaded into

the cars C. R. I. & P. No. 979; Soo Line 36470, T. & N. O. 31041, a total of 1,000 bags. The bags were loaded into the cars, 335, 335 and 330 respectively. The Soo Line is known as the "Minneapolis, St. Paul and Sault Ste. Marie." The cars were right at the pier at which the West Cheswald docked and the sugar came from the West Cheswald. Assuming that the Plaintiffs' Exhibit 16 for identification, comprising two sheets, constitutes a correct photographic copy of the railroad bill of lading on this shipment, I saw the original bill of lading when it was signed by the railroad company on December 17th, 1920, by Mr. Hayes at Washington Avenue Wharfs, at Philadelphia, Pa. That is his signature on the railroad bill of lading. He turned the bill of lading over to me and I forwarded it on to our New York office by mail, addressed to Lamborn & Company, 132 Front Street, New York City, attention Mr. Smith. The bill of lading is signed by the Pennsylvania Railroad Company by Mr. Hayes as superintendent of Pier 56, South Wharfs, Philadelphia.

The cars left the pier on December 17th, 1920.

JOSEPH A. BROWER, being introduced as a witness for the plaintiff and duly sworn, testified as follows:

By Mr. McNevin:

I reside at Rockville Center, L. I., and am twenty-five years old and employed by Lamborn & Company, and have been for nearly three years, and was in December, 1920, in the capacity of assistant in the Credit Department preparing documents. The copy of the letter dated December 23rd, 1920, that you hand me, is a copy of an original letter dictated by me and subsequently signed by a member of the firm of Lamborn & Company, Mr. Keen, attached to certain documents and sent to Bankers Trust Company. That copy was returned to the files. The copy marked "Plaintiffs' Exhibit 17 for identification" was attached with the original and went with the papers to the Bank.

The words "Received original, Bankers Trust Co., New York City, C B" represent receipt of the original letter. [fol. 34] The letters "C B" were not on the letter when it left me and I do not know what they represent.

The paper which you show me is the sight draft of Lamborn & Company drawn on the Bankers Trust Company of New York to the order of themselves for the account of T. S. Southgate & Company, Norfolk, Va., against the National Bank of Commerce, Norfolk, Va., Letter of Credit 105. I caused that paper to be prepared and the signature "Lamborn & Company" thereon is Mr. Keen's. The signature was on the paper before it was presented to the Bankers Trust Company. The words in red ink "January 7th, 1921, protested for non-payment Joseph N. Lomedico Notary Public," were not on the document when it was presented for signature, nor was the signature "Lamborn & Company." Except in those particulars the document when presented to Mr. Keen was as it appears now. The signature "Lamborn & Company" on the back of the Plaintiff's Exhibit 18 for identification is the signature of Mr. Keen, and was on it before the exhibit was presented to the Bankers Trust Company.

The paper marked "Plaintiffs' Exhibit 19 for identification" was received from George J. Hoffman & Company and is a weight certificate. Plaintiffs' Exhibits 20 and 20A for identification are invoices of Lamborn & Company in duplicate for 1,000 bags of Java white sugar sold to T. S. Southgate & Company, Norfolk, Virginia, dated December 20th, 1920, net weight of 222,680 pounds, shipped in cars C. R. I. & P. 40979, 335 bags; Soo Line 36470, 335 bags; T. & N. O. 31041, 330 bags. I caused those documents to be prepared on or about December 20th, 1920.

Assuming that Plaintiffs' Exhibit 16 for identification is admissible, the two sheets constitute together a correct photographic copy of the railroad bill of lading on that shipment, I had the original bill of lading after December 20th, 1920, that is on December 24th.

Plaintiffs' Exhibit 21 for identification is a letter certifying that the ocean bill of lading of the steamship West Cheswald is on file in Lamborn's office and is dated "Samarang Java, September 30th, 1920." The words "Lamborn & Company, N. Nelson Keen" are Mr. Keen's signature and was made on December 23rd, 1920.

[fol. 35] I caused the document to be prepared and the words "Joseph N. Lomedico" are the signature of Joseph N. Lomedico. The writing on the face of Plaintiffs' Exhibit 22 for identification was done by me and the paper

was prepared on December 24th, 1920, at which time I had the original bill of lading with me. With it at that time were Plaintiffs' Exhibit 17 for identification and the originals of Plaintiffs' Exhibits 18, 19, 20, 20A, 21 and 22 for identification.

The words on the back of Plaintiffs' Exhibit 22 for identification "Bankers Trust Company, New York City, W. J. Kenny," were not thereon when I had the paper in my possession on December 24th, 1920. I gave these papers to a messenger of Lamborn & Company, Mr. Lynch, with instructions to deliver these documents to Bankers Trust Company, Letter of Credit Department and bring back with him a receipt, also a receipt for the original letter dated December 23rd, 1920—the original of Plaintiff's Exhibit 17 for identification—and to ask them what time we could call back for the check. Later on December 24th, Mr. Lynch gave me a receipt and a receipted copy of the letter of December 23rd. Those receipts are Plaintiffs' Exhibits 22 and 17 for identification. I asked him what time the check would be ready and he said he was told to call back in the afternoon. In addition to these documents I gave Mr. Lynch a photostatic copy of the bill of lading of the steamship West Cheswald, and told him to deliver the documents to Mr. Kenny of the Bankers Trust Company. I asked him if he had the check and if he brought back photostatic copy of the steamship bill of lading, and he gave me the photostatic copy of the bill of lading and told me the check wasn't ready. That conversation was on December 24th, 1920, in the office of Lamborn & Company.

JOSEPH LYNCH, being introduced as a witness for the plaintiff and being duly sworn, testified as follows:

By Mr. McNevin:

I live at 108 Magnolia Avenue, Jersey City, N. J., and have been employed by Lamborn & Company for about [fol. 36] two years as a messenger in the Credit Department, in which capacity I was employed in December, 1920.

The original bill of lading and the photographic copy of railroad bill of lading, marked "Plaintiffs' Exhibit 16

for identification," was attached to the documents that I presented to the Bankers Trust Company on December 24th, and received by me from Mr. Brower, together with the original of a letter dated December 23rd, 1920, to the Bankers Trust Company signed by Mr. Keen. I also received on that date from Mr. Brower Plaintiffs' Exhibit 17 for identification. The words now on that letter "Received original, Bankers Trust Company, New York City, C. B." were not on the letter at that time. Plaintiffs' Exhibit 22 for identification is one of the papers that I received from Mr. Brower on December 24th, 1920, together with a sight draft on ourselves, dated December 20, 1921, for $48,009.81. That is the one marked "Plaintiffs' Exhibit 18 for identification," at which time it had the writing on the back of it "Lamborn & Company." The words on the face of it "January 7, 1921, protested for non-payment Joseph N. Lomedico, Notary Public" were not on it when received by me on December 24th.

Plaintiffs' Exhibit 19 for identification was received by me on December 24th, together with Plaintiffs' Exhibits 20 and 20A for identification, and Plaintiffs' Exhibit 21 for identification. I presented all of these to the Bankers Trust Company, Letter of Credit Department, 14 Wall Street, and saw there a clerk in the Letter of Credit Department, who was at the window. I gave him the papers. He took them to Mr. Kenny, who, I believe, is in charge of the Letter of Credit Department. I saw Mr. Kenny there at that time, but did not see what he did with the papers. I received back on the same date a receipt of Lamborn & Company stamped by the Bankers Trust Company and signed by W. J. Kenny. That is Plaintiffs' Exhibit which is marked 22 for identification. On the back of the receipt are the words "Bankers Trust Company, New York City, W. J. Kenny." A receipt was given me by the man at the window to whom I gave the documents. I also received back the letter of December 23rd, 1920. That is Plaintiffs' Exhibit 17 for identification. At that time it [fol. 37] had on the back "Received original, Bankers Trust Company, New York City, C. B." The only conversation I had with the clerk to whom I handed these papers was with reference to what time I should come back for a check and he told me to call back later in the day. I went back later in the day and saw Mr. Kenny and had

a conversation with the Clerk at the Letter of Credit Department and handed him a photostatic copy of the bill of lading of the Steamship West Cheswald and asked him to see that it was delivered to Mr. Kenny and he said he would like to see it. I did not hand him anything else and I waited in the Bankers Trust Company for about three hours before I got the bill of lading back. It was given me by a clerk in the Letter of Credit Department and I did not receive anything else beside the photostatic copy of the Steamship West Cheswald bill of lading. I brought that back and the papers which are marked "Plaintiffs' Exhibits 17 and 22 for identification", and gave them to Mr. Brower and told him that the clerk in the Letter of Credit Department told me to come back later in the afternoon.

WILLIAM J. KENNY, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I reside in New York City and am assistant manager of the Foreign Department of the Bankers Trust Company. I have occupied that position since the 10th of December, 1920, and am familiar with the transactions and communications that passed between the Bankers Trust Company and Lamborn & Company and the National Bank of Commerce of Norfolk, concerning letter of credit No. 105 dated May 11th, 1920, issued by the National Bank of Commerce of Norfolk to Lamborn & Company.

Plaintiffs' Exhibit 23 for identification is Letter of Credit No. 105 of the National Bank of Commerce of Norfolk in favor of Lamborn & Company, dated May 11th, 1920, and issued for account of T. S. Southgate & Company, Norfolk, Va. That letter of credit was mailed to us by National Bank of Commerce of Norfolk, and after we received [fol. 38] it we retained it in our files and notified Lamborn & Company that we had the credit. Plaintiffs' Exhibits for identification Nos. 22, 19, 18, 17, 21, 20 and 20a were presented to us on December 24th, 1920, in the office of the Bankers Trust Company, where I saw them at that time. The Bankers Trust Company stamp on back of Plaintiffs' Exhibit 22 for identification was signed by myself, and

is given as a receipt for the documents presented to us. The writing on the lower righthand corner of Plaintiffs' Exhibit 17 for identification is the rubber stamp of Bankers Trust Company, initialed for by Mr. Charles Brockman. His initials and the stamp were given as a receipt for the original of this letter (Exhibit 17 for identification).

Plaintiffs' Exhibit 17a for identification was received by us on or about December 24th, 1920, at which time I saw it at the office of the Bankers Trust Company. It is the letter for which the writing on the lower righthand corner of Exhibit 17 for identification is a receipt. With the exception of the marks, filemarks, etc., now on it, Exhibit 17a for identification was in exactly the same form as it is now. The mark in pencil in the lower lefthand side is a notation "file" initialed by myself with an arrow extending to the name of Lamborn & Company as directions for the file girl. The letters in pencil in lower lefthand margin "No" were not on the letter when we received it.

The original railroad bill of lading accompanied the Lamborn & Company draft, which we received on the 24th of December. It was the original of the photostatic copy constituting "Plaintiffs' Exhibit 16 for identification."

We did not pay Lamborn & Company a check in the amount of that draft and have never so paid them, and the documents presented to us on December 24th, 1920, accompanying the draft were returned to Lamborn & Company by us about January 5th, 1921, accompanied by a letter marked "Plaintiffs' Exhibit 24 for identification," signed my be. The letter is in the same form at the present time with the exception of the red ink marks and the rubber stamp in the upper lefthand corner. The documents referred to in the letter and which were presented [fol. 39] on December 24th, 1920, were re-presented to me at Bankers Trust Company about January 6th, 1921. They were the same documents as those presented on January 5th, 1921, except for Plaintiffs' Exhibit 22 for identification. The paper now marked "Plaintiffs' Exhibit 25 for identification" was also presented on January 6th, 1921. We did not retain the documents nor pay Lamborn & Company the amount of the draft or any part of it at that time, nor have we since, but we returned the documents on that day to Lamborn & Company with a memo-

randum dated January 6th, 1920 (should be 1921), addressed to Lamborn & Company in my own handwriting refusing payment and returning the documents. That is my handwriting except the word "memoranda", and those are my initials under the letters "B. T. Co." I attached the memorandum to the documents and returned the memorandum and documents to Lamborn & Company's messenger.

After receiving the Letter of Credit marked "Plaintiffs' Exhibit 23 for identification", Bankers Trust Company communicated with the National Bank of Commerce of Norfolk, Virginia, and "Plaintiffs' Exhibit 27 for identification" is the letter received in the mail from that Bank. It was received on or about July 16th, 1920, and has been retained in my file of the correspondence between Bankers Trust Company and National Bank of Commerce of Norfolk. It is in the same condition now as when received with the exception of the file number and rubber stamp put on by our mail clerks and the writing in the lower lefthand corner in my own handwriting.

Prior to December 10th, 1920, and after May 1st, 1920, I was the teller in the Foreign Department in charge of the Commercial Credit Division and was in charge of the letter of credit called 105, issued by the National Bank of Commerce of Norfolk, Virginia, to Lamborn & Company.

Plaintiffs' Exhibit 28 for identification is the letter from Bankers Trust Company dated July 16th, 1920, to Lamborn & Company relative to credit 105 of the National Bank of Commerce of Norfolk, signed by Mr. C. F. Bock, assistant manager of the Foreign Department. Plaintiffs' Exhibit 29 for identification was first seen by me about December [fol. 40] 28th, 1920, at the office of Bankers Trust Company and it was received through the mail or delivered by hand and has been in the files of the Bankers Trust Company ever since. After January 6th, 1921, we received correspondence from the National Bank of Commerce of Norfolk relative to letter of credit 105 and draft drawn thereon, and notice of protest from the Notary who protested the draft. The notice of protest, plaintiffs' Exhibit 30 for identification, was received on or about January 8th, 1921. I believe it was delivered by hand. We notified the National Bank of Commerce of Norfolk, Virginia, that the item had been

protested and filed a notice of protest. Plaintiffs' Exhibit 31 for identification is a copy of the letter notifying the National Bank of Commerce of Norfolk of the receipt of notice of protest by us, with the exception that the original is on our letterhead.

Plaintiffs' Exhibit 32 for identification was received by Bankers Trust Company, through the mail from the National Bank of Commerce of Norfolk, Virginia, and referred to me for attention. After reading it it was regularly filed and has been in our files up to the present.

Plaintiffs' Exhibit 33 for identification was received in the office of Bankers Trust Company from the National Bank of Commerce, Norfolk, Virginia, December 13th, 1920, was filed and except for the rubber stamps and pencil markings on it is in the same condition as it was at that time. The statement in that letter, "We beg to ask therefore that you kindly notify us by wire when the documents are presented, so that we can arrange to examine and approve them", were observed by me, and I notified the Bank of Commerce in accordance with that request. They did not cause an examination and inspection to be made of the documents after notification that we had received them.

Plaintiffs' Exhibit 34 for identification is a copy of Bankers Trust Company letter of December 13th, 1920, in answer to the letter from the National Bank of Commerce of Norfolk, Virginia, which has been marked "Plaintiffs' Exhibit 33 for identification", and is in all respects a true copy of the original, except that the original is on the letterhead of the Bankers Trust Company. The signa- [fol. 41] ture is that of J. F. Schmid, Vice-President of Bankers Trust Company.

We notified the defendant Bank of the presentation of the documents on December 24th, 1920, by telegram, and Plaintiffs' Exhibit 35 for identification is a copy of our telegram of December 20th, 1920, relative to the draft and documents. After the receipt of letter of credit No. 105, Plaintiffs' Exhibit 23 for identification, we acknowledged the credit and placed the letter in our files, acknowledgment being made by letter of which Plaintiffs' Exhibit 35 for identification is a copy, the original being signed by F. A. Klingsmith, Assistant Treasurer. Plaintiffs' Exhibit 37 for identification is a letter dated September 3rd,

1920, from National Bank of Commerce of Norfolk, Va., to Bankers Trust Company, arriving September 7th, 1920, by mail. Plaintiffs' Exhibit 38 for identification is a copy of Bankers Trust Company's reply to the letter received from National Bank of Commerce of Norfolk, dated September 3rd, 1920, dictated by myself and signed by F. A. Klingsmith, Assistant Treasurer. This letter was acknowledged by letter on September 14th, from the National Bank of Commerce of Norfolk, Va., marked "Plaintiffs' Exhibit 32 for identification."

JOSEPH N. LOMEDICO, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I reside at 1760 West 13th Street, Brooklyn, and am a Notary Public for the State of New York and held that office in 1921 for King's County, and have a certificate filed in New York County. I was authorized to take protests on negotiable instruments in New York County at that time and Plaintiffs' Exhibit 30 for identification is an original protest with my signature on it in my capacity as Notary Public. After signing it I took it to the Bankers Trust Company personally, asked for payment which was refused, and naturally I protested the document, presenting with the draft Plaintiffs' Exhibits 19, 20, 20a and 21 for identification and original of photograph of railroad [fol. 42] bill of lading marked "Plaintiffs' Exhibit 16 for identification."

Plaintiffs' Exhibit 18 is the original draft for $48,009.81, dated December 20th, 1920, drawn by Lamborn & Company on the Bankers Trust Company, protested by me on January 7th, 1921. It is the draft to which the protest marked "Plaintiffs' Exhibit 30" relates. I mailed a copy of the protest marked "Plaintiffs' Exhibit 30 for identification" to the National Bank of Commerce of Norfolk, Virginia, and another one to the Bankers Trust Company of New York, another to T. S. Southgate & Company, Norfolk, Va., and one I delivered personally to Lamborn & Company, to Mr. N. Nelson Keen.

(NOTE.—Plaintiffs' Exhibit 30 for identification offered in evidence).

I was paid the fee and disbursements of $1.20 by Lamborn & Company.

The draft referred to in this witness' testimony and marked Exhibit No. 9, is in the words and figures as follows, to-wit:

"PLAINTIFFS' EXHIBIT 18 FOR IDENTIFICATION—4/17/22.
H. C. T.

DS-2855

Lamborn & Company

$48,009.81. New York, December 20, 1920. 192-.

At sight pay to order of ourselves forty-eight thousand and nine dollars 81/100 Dollars, with exchange, value received, and charge the same to account of T. S. Southgate & Company, Norfolk, Va.
6/11/20.

National Bank of Commerce, Norfolk, Va.

L/C-105 5/11/20.

[fol. 43] To Bankers Trust Co., New York City. Lamborn.
No. —.
Endorsed by Lamborn & Co.
January 7, 1921. Protested for non payment. Joseph N. Lomedico, Notary Public. (Seal.)

WILLIAM H. LIGNANTE, being recalled as a witness for the plaintiff, testified as follows:

By Mr. Bentley:

About December 17th, 1920, I brought the papers marked Plaintiffs' Exhibit 53 for identification out with me from New York to Philadelphia filled in in blank, that is, without the car numbers on there, and after these sugars were shipped the car numbers were inserted by the rail-

way company, and I received this bill of lading in return, (Plaintiffs' Exhibit 53 for identification) this and the original after it had been signed by the railroad company. It was signed by William Hayes, the man in charge of Pier 56, South Philadelphia, the pier at which the West Cheswald was docked in December, 1920. The same person signed Plaintiffs' Exhibit 53 for identification that signed the original of Plaintiffs' Exhibit 16 for identification. I saw the original of Plaintiffs' Exhibit 16 for identification signed at the same time and place, and the signature on Plaintiffs' Exhibit 53 for identification is an original signature.

I saw Mr. Hayes at his office outside of Pier 56, Philadelphia. That is a railroad company pier. He was tallying and sealing cars and then he would order the yard master to send an engine down for the filled cars, and then sign up these bills of lading.

The string of three piers there are called the Washington Avenue wharves of the Pennsylvania Railroad. I saw [fol. 44] Hayes sign other bills of lading purporting to be railroad bills of lading, around eight- or ninety I should judge. I was referred to him by Mr. Considine's office of the Pennsylvania Railroad. I paid the charges incurred on the sugar while on the pier after being discharged from the West Cheswald and before it was put on the cars, that is, the duty, trucking and tiering on the pier, and weighing cars, to George J. Hoffman & Company for Lamborn & Company; also the stevedore on the pier, Loveland & Company, and overtime for the talley clerks to the Atlantic Coast & Shipping Company. The duty covered by Exhibit 16 and 53 for identification was paid before the sugar was placed aboard cars.

Then counsel read the following letter marked "Plaintiffs' Exhibit 17-a" for identification, and "Plaintiffs' Exhibit No. 8" of this record:

PLAINTIFFS' EXHIBIT 8

"New York, December 23rd, 1920.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: We herewith beg to hand you shipping documents covering 1,000 bags of Java White Sugar, amounting

to $48,009.81, to apply against your Letter of Credit dated 6/12/20, opened in our favor for account of T. S. Southgate & Company, Norfolk, Va.

The injunction granted, copy of which was served upon you, authorizes us to deliver documents to your goodselves, and you to retain same subject to further order of the court upon this injunction, which at present only prevents Lamborn & Company from accepting payment for the above shipment.

Yours very truly, Lamborn & Company. N. Nelson Keen, Member of Firm."

JB.FB.

[fol. 45] This letter was offered in evidence and in connection therewith the accompanying papers were offered, fastened together as a single exhibit marked "Plaintiff's Exhibit No. 9," being the draft dated at New York December 20th, 1920, numbered 2855 for the amount of $48,009.81 drawn by Lamborn & Company on the Bankers Trust Company, value received and charge the same to T. S. Southgate & Company 6/11/20 National Bank of Commerce, Norfolk, Virginia, and endorsed by Lamborn & Company; also the invoice of Lamborn & Company dated December 20th, 1920, reading as follows:

"Lot No. P. C. 22. Order No. SS. West Cheswald.
Invoice No. DS—8622. Sold to T. S. Southgate & Co. Norfolk, Va.
Terms Bankers Trust Co. 6/11/20.
National Bank of Commerce, Norfolk, Va.
L/C—105—5/11/20.
1,000 bags of Java White Sugar.

1,000 bags of Java White Sugar, Net Weight 222,680 lbs., at 22¢ per lb. Duty paid F. O. B. Cars Philadelphia, Pa. Landed Weights	$48,989.60
Less 2%	979.79
	$48,009.81

C R I & P—40979 335 Bags.
Soo Line 36470 335 " E. & O. E.
T & N O 31041 330 "
SD—2855.
(Certified weight sheet attached.)"

And accompanying that the certificate dated at New York September 23rd, 1920, reading as follows:

"New York, December 23, 1920.

To whom it may concern:

This is to certify that the 1,000 bags of Java White Sugar [fol. 46] invoiced by us on our DS No. 8622, to T. S. Southgate & Co., Norfolk, Va., were unloaded from the S/S "West Cheswald," and ocean bills of lading are on file in our office dated Samarang, Java, Sept. 30, 1920.

Yours very truly, Lamborn & Company, N. Nelson Keen, Member of Firm.

PJB/FB.

Sworn to before me, this 23rd day of Dec., 1920. Joseph N. Lo Medico, Notary Public. (Seal.)"

Together with the sworn certificate of George J. Hoffman & Co., weighers, dated December 17th, 1920, reading as follows:

"New York, December 17th, 1920.

Return of 1,000 Bags Sugar weighed for Mess. T. S. Southgate Co., Norfolk, Va. By order of Mess. Lamborn & Co. Ex. S. S. "West Cheswald."

Car	CRI&P	40979	335	Bags	wg.	75420	lbs.	gross
	MSPSM	36470	335	"	"	75620	"	"
	TNO	31041	330	"	"	74240	"	"

1000 Bags wg. 225280 lbs. gross
2600 lbs. tare

222680 lbs. net

Geo. J. Hoffman & Co."

And the receipt of the Bankers Trust Company for the shipping documents, a duplicate invoice being introduced as "Plaintiff's Exhibit No. 10," reading as follows:

[fol. 47] "Lamborn & Company, 132 Front Street, New York

Lot No. P C 22.
Order No. SS West Cheswald.
Invoice No. DS—8622. December 20, 1920.
Sold to T. S. Southgate & Co.,
Norfolk, Va.

Bankers Trust Co. 6/11/20
Terms
MK Nat'l Bank of Commerce, Norfolk, Va.
L/C—105—5/11/20.

1000 Bags of Java White Sugar.

1,000 Bags of Java White Sugar, Net Weight 222,680 lbs. at 22¢ Per Lb. Duty Paid F. O. B. Cars Philadelphia, Pa. Landed Weights	$48,989.60
Less 2%	979.79
	$48,009.81

C R I & P—40979 335 Bags.
Soo Line 36470 335 " E & O E.
T & N O 31041 330 "
(Certified Weight Sheet attached.)"

Counsel for the plaintiff then read the deposition of Joseph Lynch beginning on page 76 of the deposition taken in New York on April 17th, 1922, and it was stated that counsel for the defendant conceded the exhibits referred to in that deposition as being the same that were introduced as Exhibits 9 and 10.

N. Nelson Keen, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

I reside in Upper Montclair, New Jersey, and in Decem-
[fol. 48] ber, 1920, and January, 1921, was a member of the firm of Lamborn & Company, New York City. I was the member of that firm who had special duties in connection with the collection of drafts against letters of credit. I remember the letter of credit which was posted for the benefit of Lamborn & Company by the National Bank of

Commerce of Norfolk, Virginia, with the Bankers Trust Company, and I noticed as it was read, a certain exhibit here referred to in the injunction, and I recall that the injunction was vacated. After the vacation of that injunction I went to the Bankers Trust Company with the bundle of papers that I have in hand (these papers are papers heretofore introduced as Exhibits 7, 8 and 9). I had, before going to the Bankers Trust Company with those papers, received a letter from the New York office of said Company, dated January 5th, 1921, (letter marked for identification "Plaintiff's Exhibit No. 24" not offered in evidence). On January 6th, 1921 I went to the Bankers Trust Company and saw Mr. Kent, a Vice-President, and also Mr. Smith, a Vice-President. I pointed out to Mr. Kent that the injunction against this letter of credit had been vacated by a court order and the documents were now in order for payment under the letter of credit. We had some little discussion there about it, the exact words of which I don't remember, but Mr. Kent told me that they had been instructed by the National Bank of Commerce of Norfolk, Va., not to pay the credit and as they were only the paying agents and had not confirmed the credit to us, they would have to abide by the instructions received from the National Bank of Commerce, their principal, and after that discussion I went back to our office. I had the complete papers with me and the bank officers looked them over. I would not like to say definitely whether or not anything was said to me concerning their form or contents, but I think the bank felt the papers were in order.

When this irrevocable letter of credit was first issued the Bankers Trust Company were made the New York paying agent for the National Bank of Commerce of Norfolk. The letter of credit itself was delivered to our firm.

When this cargo of sugar came in from Philadelphia, the draft with the bill of lading attached was presented at the New York office of the Bankers Trust Company, the documents being dated December 24th and the railroad [fol. 49] bill of lading being dated December 17th. The draft is dated December 20th, 1920 and was presented at the Bankers Trust Company on December 24th, at which time payment was refused. Later on January 6th or 7th, I personally presented all of these papers and asked to have the draft taken up. In the meantime the sugar had

gone forward and the bill of lading continued in our posession until it was presented the second time on the 6th, that is, after it had been sent back to us. On January 6th, 1921 the officers of the Bankers Trust Company did not state any objection as to the form of contents of my draft and shipping documents. I demanded payment of the draft and payment was not made. The draft was protested and the documents were taken back by me.

NOTE.—The plaintiff offered in evidence the protest of the draft, marked "Exhibit No. 11," of which the following is a copy:

EXHIBIT No. 11

UNITED STATES OF AMERICA,
State of New York, ss:

On the seventh day of January in the year of our Lord one thousand nine hundred and twenty-one at the request of the holder thereof, I, Joseph N. Lo Medico, a Notary Public, duly commissioned and sworn, dwelling in Kings County did present the original instrument hereunto annexed, to a person in charge of the office of Bankers Trust Company, 16 Wall St. in the City of New York (being the place where the said instrument is payable) and demand payment thereof, which was refused:

And answer "Will not pay."

Whereupon, I, the said Notary, at the request aforesaid, did protest, and by these presents, do publicly and solemnly protest as well against the Drawer and Endorsers of said instrument, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of said instrument.

[fol. 50] In testimony whereof, I have hereunto set my hand and affixed my seal at the above date as aforesaid.

Joseph N. Lo Medico, Notary Public. (Seal.)

Lamborn & Co., New York.
Nat'l Bank of Commerce, Norfolk, Va.
Bankers Trust Co., New York.
T. S. Southgate & Co., Norfolk, Va.

Cross-examination.

By Mr. Taylor:

I received the letter of January 5th from Bankers Trust Company to Lamborn & Company, being exhibit No. 24. That refers to a telegram or wire from the Bank of Commerce to the Bankers Trust Company. The documents that I have referred to as being presented by me to the Bankers Trust Company had reference to sugar exclusively. That sugar was shipped in September from Java and destined for Philadelphia.

Q. Why do you say that?

A. That was the destination of the cargo.

Q. Of the "West Cheswald"?

A. The option was Port Said for orders—the ocean bill of lading.

Q. When it reached Port Said, what were the orders?

A. I think there were no definite orders given. I think the bill of lading called for Port Said, option New York, and as we did not give them any definite instructions at Port Said, she proceeded on towards New York.

Q. To New York?

A. Yes.

Q. Is it not a fact that your firm gave a dollar a ton for the privilege of diverting that vessel three days before she docked?

A: It is.

After we had not exercised the option at Port Said I feel that we had lost authority to divert the steamer to any place we wanted her on the Atlantic Coast. It was a fact that she was on her way to New York when she was diverted. If we hadn't diverted her she would have come to New York.

[fol. 51] Q. And prior to December 13th, 1920, she was never destined to Philadelphia?

A. Not at that time; no, sir.

Q. So up to the 13th of December, there was no shipment on the high seas destined for Philadelphia out of which this sugar could have been delivered?

A. I don't say that. I think we had another cargo.

Q. There was certainly none in the "West Cheswald"?

A. I consider we had the option, if we wanted to exercise it, with consideration, to put her into Philadelphia, Baltimore or Boston.

Our obligation in the shipment in question was a shipment from Java to Philadelphia and we had to pay, three days before docking, a dollar a ton to exercise an option in favor of Philadelphia.

I am familiar with the terms of this letter of credit and with the language: "If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to; otherwise payment will not be effected. That language has always been a part of the contract."

At this point the following admission was inserted in the record by consent of counsel:

"All the plaintiffs are citizens of states other than the State of Virginia, and the defendant is a National Banking Association duly chartered, organized and doing business under the laws of the United States of America with its principal office in the City of Norfolk, in the Eastern District of Virginia. The partnership as alleged is admitted. It is further admitted that the duty on the sugar has been paid."

At this point plaintiffs rested.

Defendant's Motion for Directed Verdict

And thereupon counsel for the defendant moved the Court to direct the jury to find a verdict in favor of the defendant upon the following grounds:

1. That the letter of credit of May 11th, 1920, which is the subject of this suit provides that there should be a shipment of the sugar in question during the months of [fol. 52] August and September, 1920, at the option of Lamborn & Company, by steamer or steamers from Java to Philadelphia, and the evidence introduced in the case shows that said condition was not complied with on two grounds:

(a) The evidence introduced as to shipment on the "West Cheswald," being an ocean bill of lading dated at Samerang on September 30th, 1920, and signed at Batavia by a witness who was not in touch with and did not actually see the merchandise in question and whose evidence clearly shows that it was not intended to be a receipt of merchandise until certain other formalities had been complied with, namely, the furnishing of the Mate's receipt as to which there was no evidence; and (b) that the evidence introduced and relied on by the plaintiffs showed a shipment of sugar from Samerang, Java to Port Said, Egypt, with the option to New York, and the evidence further shows that the vessel even assuming that she was loaded, or that the sugar in question was shipped on the 30th day of September, 1920, was destined and on her way to New York from that time until the 13th of December, 1920, and was diverted by request from Lamborn to the Shipping Board and upon a payment of One Dollar ($1.00) per ton for the privilege of diverting said vessel three days before she actually docked at Philadelphia, and that up to that time it was a shipment from Java to New York and nowhere else.

2. That the railroad bill of lading which was tendered with the documents for payment to the Bankers Trust Company did not call for "Java white sugar" but simply "Java sugar."

ORDER OVERRULING MOTION FOR DIRECTED VERDICT

Whereupon said Court overruled said motion for a directed verdict in favor of the defendant, giving its reasons as follows:

"Gentlemen, I have been very much interested in the argument and very much benefited by the very thorough way in which it has been treated by counsel. The three points on which Mr. Taylor based his argument I have already considered one of and practically disposed of it, [fol. 53] that is as to the compliance with the terms of the letter of credit in the matter of the shipment of the sugar

and it is only necessary, as far as I am concerned, to say that it seems to me that the provision that it should be shipped in August or September was shown to have been complied with by the bill of lading dated not later than the 30th of September and by the evidence supplied by the deposition as well. Whether that is a fact or not, it establishes it in such a way that it throws the burden of disproving it upon the other side, and that being true and not being met, the motion as to that point is overruled.

The second point that the shipment had to be from Java to Philadelphia from its inception without any diversion after the ship had left the original port of loading seems to me to find such support as there may be said to be to that position in the right of the purchaser of the sugar to insure his interest and his profits, and if that be true, that condition would not apply in the case of a guarantor like a bank furnishing a letter of credit, and in determining the question of compliance with the terms of the letter of credit, it seems to me the only guide can be the terms of the letter of credit itself. That provides that shipment be made during August and September, 1920, at option of seller by steamer or steamers from Java to Philadelphia. There isn't any suggestion that the shipment was not from Java and it is equally true and a concession in the case that the ultimate destination of the steamer was Philadelphia. It happens that that destination was accomplished, as Mr. Taylor points out, as the result of a subsequent arrangement with the owner of the steamer just three days out of port by which in consideration of a bonus freight rate, she was diverted from New York, her original destination, to Philadelphia. If we were dealing with a contract between Southgate & Company and Lamborn & Company in which the contract required that they should designate the ship on which the cargo was to be loaded and which was to be used for the transportation of the cargo, that, of course, would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Scotland case, the steel case, would at once arise when the declaration was made, and I can very readily understand that an insurable interest in a contract requir- [fol. 54] ing a shipment of sugar to Philadelphia might not

obtain in a case of a shipment to New York, but, as I intimated a moment ago, that contract is not in evidence in this case. I don't know what its terms may be, and the suit is on a letter of credit issued by the bank."

(NOTE.—Counsel for defendant here stated that that contract is in this case as one of the plaintiffs' exhibits in the same language as the letter of credit.)

"It may be in the case, but it seems to me very clear that the rights of the defendant in this case can't extend beyond the terms of the letter of credit itself and the letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be a compliance with the contract. It would be all that reason and fair play and justice would require.

I was very much interested in the Supreme Court case and, of course, if it is parallel with this I should have to follow it and be bound by it, but I do see a difference between a shipment from Leith and a shipment from Glasgow. The delivery of this sugar at New York would unquestionably have been a non-compliance with the contract which would have avoided this letter of credit, so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract, notwithstanding the precise quantity and precise character and quality of sugar furnished, but to say that although the exact terms of the contract were complied with, because it was not the purpose or not the intention or not the arrangement that what was done should be done at the beginning, vitiated this guarantee, it seems to me is going farther than I think I have any right to go and, of course, I am influenced to some extent by the fact that Judge Hand had decided this question in the Southern District of New York and the Supreme [fol. 55] Court of Pennsylvania has likewise decided, as I see, precisely the same question. While I am not bound by either, they are persuasive, and I should be very loath to

depart from the decisions announced by those courts in an identical case, unless, as I see it, the question is foreclosed by some other decision by some court by which I am bound. The third point that the bill of lading does not describe the sugar accurately in that it says so many bags of sugar rather than so many bags of white sugar, it seems to me the failure, if there is any in that respect, is supplied by the accompanying invoice which is a paper provided for in the contract itself by the bank. The bank made it a condition of the payment of the money that there should be furnished a bill of lading and an invoice and it seems to me if the one supplies any deficiency in the other, at least as far as the description is concerned, it was in contemplation of the parties that would have been the purpose and the only purpose of the invoice. The draft itself was for the precise amount of money covered by the contract. The bill of lading was for the delivery of the sugar, and the only purpose of an invoice would be to acquaint the bank with the statement of the seller as to the quantity and quality and character of the thing itself, and it seems to me to be in line with this case in 282 Federal. Certainly it is what is reasonable under the circumstances. With the weigher's certificate and the invoice of the seller, if the purchaser had felt that he was taking a chance in paying the draft before delivery of the sugar because he didn't know its quality, it seems to me that in fair play some arrangement coud have easily been made by which the information could have been furnished as by inspection which, had he applied for it, would have been furnished by the seller of the sugar, or the right to inspection, he having then possession of the bill of lading and control of the shipment. So it seems to me it wouldn't be in the interest of justice to say that such a failure as that was basic and was such as would justify a court in causing a breach of contract otherwise complied with when there isn't any real contention that the contents were not as they were represented to be, so that with great diffidence, gentlemen, I am impelled to overrule the motion for a directed verdict."

[fol. 56] To which action of the Court in so overruling the said motion the defendant by counsel duly excepted and tenders this, its bill of exceptions and prays that the same

may be signed, sealed and made a part of the record, which is accordingly done.

Counsel for the defendant then introduced all of the depositions, together with the exhibits accompanying the same that were not introduced and presented by the plaintiff in making out its case and which had been taken by the plaintiff. These depositions are as follows:

Depositions taken pursuant to notice on behalf of the plaintiff at the office of Van Doren, Conklin, McNevin and McClenthen, Room 1115, No. 31 Nassau Street, New York City, February 10th, 1922.

GIICHI ISHIDO, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My name is Giichi Ishido, I reside at 500 West 140th Street, New York City, apartment 4 B. I am over twenty-seven and a clerk of Suzuki & Company, whose place of business is 220 Broadway, New York City. Their head office is in Kobe, Japan, and their general business is that of Importers and Exporters. They are the agents for the Teikoku Kisen Kabashiki Kaisha Steamship Line. I have been with the company about four years. In 1920 I was in Java and at that time I knew M. Kamimura I knew him from August to November 11th, 1920, in Surabaya, where he was in the sugar business, that is, he was the manager of Suzuki & Company, in Surabaya, and handled sugar shipments for that Company. I arrived in Surabaya August 10th and stayed there continuously until November 11th, 1920. Mr. Kamimura was staying in Soerabaya and sometimes in Semarang. I saw him frequently and came to know him quite well.

I was a clerk for Suzuki & Company in Soerabaya and was handling sugar shipments. He was my superior there. I know his signature quite well. I know the seven papers which you show me very well. They are in the form used by Suzuki & Company, as agents for the Teikoku Kisen [fol. 57] Kabashiki Kaisha Steamship Company. While I

was a clerk in the office of Suzuki & Company, Soerabaya, Java, those papers came into my hands and I examined them in the course of my duties.

I recall the Steamship Chifuku Maru. I don't know what line she belonged to but Suzuki & Company were agents for her. I recognize the signature of M. Kamimura on each one of those seven papers.

(Note—Paper Number 5 is marked "Plaintiff's Exhibit 1" for identification. Paper Number 6 is marked "Plaintiff's Exhibit 2" for identification.)

In the papers 8, 9 and 10 the alteration or substitution of the word "Philadelphia" for "New York" was made on the papers by myself in my own handwriting.

(Note—Paper Number 8 is marked for identification "Plaintiff's Exhibit 3." Paper Number 9 is marked for identification "Plaintiff's Exhibit 4." Paper Number 10 is marked for identification "Plaintiff's Exhibit 5." Paper Number 11 is marked for identification "Plaintiff's Exhibit 6." Paper Number 12 is marked for identification "Plaintiff's Exhibit 7."

The words "as arranged" in ink were on Exhibits 1, 3, 4 and 5 before they were delivered to me. The words "as arranged" on exhibits for identification 2, 6 and 7 in type were also on those papers before they came into my hands.

Plaintiff's Exhibits for identification 1, 2, 3, 4, 5, 6 and 7 are genuine bills of lading issued by Suzuki & Company at Soerabaya, Java, for the Steamship Chifuku Maru. I have examined the dates of the respective bills of lading, being Plaintiff's Exhibits for identification 1 to 7 inclusive.

I have Suzuki & Company's office copy of No. 11, being Plaintiff's Exhibit for identification No. 6, which came from Soerabaya to Suzuki & Company in New York. That office copy shows that the date of No. 11 is September 24th, 1920. All of those documents were delivered by Suzuki & Company on the date of issue, that is, the date loading of the cargo was finished. I don't remember exactly whether or not that was the dates that were on the documents but [fol. 58] likely within ten days or two weeks. The signature to the endorsement under the typewritten words "per

pro Suzuki & Company" on Plaintiff's Exhibits for identification 1 to 7 inclusive, is the genuine signature of M. Kamimura.

JINOSUKE MINAMI, being duly sworn and examined as a witness for the plaintiff, through an interpreter, also duly sworn, testified as follows:

By Mr. Van Doren:

I live at 135 Kelvin Street, Forrest Hills, Long Island. I am thirty-five years of age and the New York representative of Suzuki & Company of Kobe. I am the Manager of Suzuki & Company in New York. They are agents for the Teikoku Kisen Kabashiki Kaisha. Suzuki & Company is a partnership and not a corporation.

I know M. Kamimura personally. His first name is Masakichi. I have known him for four or five years. He is employed by Suzuki & Company and was, I am informed, in September 1920 in Soerabaya.

Suzuki & Company were agents for the Steamship Chifuku Maru. That was the ship of the line Teikoku Kisen Kabashiki Kaisha.

I know the signature of M. Kamimura in the Japanese form, but the signatures on the bills of lading, Plaintiff's Exhibits 1 to 7, inclusive, for identification, are written in English script.

H. VICTOR CRAWFORD, being introduced on behalf of the plaintiffs and being duly sworn testified as follows:

I live at 31 Irving Street, Montclair, N. J., and am a lawyer by profession, connected with the firm of Hunt, Hill & Betts, 120 Broadway, New York City. I was connected with that firm in November and December 1920 and know generally the firm of T. S. Southgate, Daniel M. Thornton and Elias Etheridge, comprising the copartnership firm of T. S. Southgate & Company. I know Mr. Thornton personally.

[fol. 59] We represented them in an action against Lamborn & Company. In connection with the suit brought by us against Lamborn & Company we had occasion to talk to Mr. Thornton about the contract between Lamborn &

Company and T. S. Southgate & Company, dated April 23rd, 1920, and we saw the duplicate original of the contract in Mr. Thornton's possession. It is the duplicate original of Plaintiffs' Exhibit 39 for identification. As to the same signatures appearing thereon I am sure about Lamborn & Company's signature and it is my recollection that Thornton had signed the copy of the contract I had for Southgate. We received all of the correspondence that passed between the parties in interest from the date of the contract to December 13th, 1920. I saw the originals of all of the letters from Lamborn & Company to T. S. Southgate & Company, the first dated August 30th, 1920, marked "Plaintiffs' Exhibit 40 for identification"; the second dated September 29th, 1920 marked "Plaintiffs' Exhibit 41 for identification"; the third dated November 10th, 1920, marked "Plaintiffs' Exhibit 42 for identification," and the fourth dated December 13th, 1920, marked "Plaintiffs' Exhibit 43 for identification." We had them in our possession for some time. They were part of the letters which we received by special delivery from T. S. Southgate & Company early in December 1920, except the original of the one marked "Plaintiffs' Exhibit 43 for identification" and the original of that letter we received shortly after its date from T. S. Southgate & Company. We received a request from T. S. Southgate & Company about January 13th, 1921, to return these papers for the use of the Bank in Norfolk and on January 13th we forwarded the contract and all of the letters, copies of which have been marked for identification here. Later, on February 23rd, we mailed to T. S. Southgate & Company all papers in our possession, which had any bearing on the Chifiku Maru shipment. We received an acknowledgment of these letters and contract by letter from T. S. Southgate & Company, dated February 24th, 1921, reading as follows:

[fol. 60] "T. S. Southgate & Company, Norfolk, Va.

February 24th, 1921.

Messrs. Hunt, Hill & Betts, No. 120 Broadway, New York, N. Y.

Gentlemen: We have your letter of February 23rd, enclosing additional correspondence in regard to our Chifuku case and thank you for your promptness in sending it.

Yours very truly, T. S. Southgate & Co. Thornton."

The matters to which I have testified today have been concerning the existence of the contract marked for identification "Plaintiffs' Exhibit 39," and the letters copies of which have been marked "Plaintiffs' Exhibits for identification 40 to 43," inclusive. So far as our firm are connected with the same, they are matters of public record in New York County. They are all attached to complaints and affidavits filed in the County Clerk's Office of New York County on or about the 15th day of December, 1920, in an action entitled "Southgate & Company against Lamborn & Company, Action No. 2."

N. NELSON KEEN, being sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I reside in Upper Montclair, New Jersey, and in 1920 and in the early part of 1921 was a member of the firm of Lamborn & Company, who were a firm of sugar brokers and merchants, exporters and importers, and were a co-partnership.

Lamborn & Company had quite a lot of business dealings [fol. 61] with T. S. Southgate & Company in 1920 and with the National Bank of Commerce of Norfolk, Virginia, in the fall of 1920 and early in 1921.

Plaintiffs' Exhibit 39 for identification is a sales contract on 1000 bags of Java sugar, 10% more or less, to T. S. Southgate & Company, Norfolk, Va., dated April 23rd, 1920. The signature of Lamborn & Company thereon is my signature, signed by me on behalf of Lamborn & Company. Plaintiffs' Exhibit 23 for identification is a letter of credit issued by the National Bank of Commerce, Norfolk, Virginia, dated May 11th, 1920, for $53,123.84, covering 1000 bags, 10% more or less, of Java white sugar, at 22¢ per pound, less 2%, duty paid f. o. b. cars Philadelphia, Pa., landed weight, payable at the Bankers Trust Company, New York City. That letter of credit was accepted by Lamborn & Company.

Plaintiffs' Exhibit 28 for identification is an original letter from the Bankers Trust Company, dated July 16th, 1920, referring to credit No. 105, dated May 11th, 1920,

from the National Bank of Commerce, Norfolk, Va., eliminating the requirement of an ocean bill of lading to be produced with documents showing shipment from Java to Philadelphia. That letter was accepted by Lamborn & Company as a modification of letter of credit marked "Plaintiffs' Exhibit 23 for identification."

Lamborn & Company made a shipment of Java white sugar from Java in the month of September, to Philadelphia, in steamers in sufficient quantity to fulfill the contract with T. S. Southgate & Company which has been marked "Plaintiffs' Exhibit 30 for identification." The Steamer West Cheswald, Steamer Chifuku Maru and the Steamer Washington Maru carried such shipments, each of them carrying Java white sugar shipped in the month of September from Java to Eastern Atlantic ports of the United States. The West Cheswald and the Chifuku Maru had approximately 4,000 tons of sugar for Lamborn & Company, and the Washington Maru had about 1,000 tons. That would be about 10,000 bags on the Washington Maru, 34,000 bags on the Cheswald, and about 40,000 bags on the Chifuku Maru. Lamborn & Company had purchased this sugar prior to shipping date, in all cases, from Java by written contract.

The papers which you show me are photostatic copies [fol. 62] of the original contract dated April 9th, 1920, between Lamborn & Company, buyers and the Nederlandsche Maatschappy Voor Ovezee Handel, sellers. The original was in Lamborn & Company's office. We gave them back and accepted duplicate original. I do not know where the original is at the present time. It cannot be found.

(Paper marked "Plaintiffs' Exhibit 44 for identification.")

In reference to the second paragraph of that contract covering sugar for shipment during September, 1920, the largest part of that sugar was shipped on the Steamer West Cheswald and the balance on the Steamer West Conifax.

The paper writing dated April 12th, 1920, handed me by you is an original contract between Lamborn & Company, buyers and Czarnikow-Rionda Ltd., London. It is produced from the files of Lamborn & Company.

(Note—Paper marked "Plaintiffs' Exhibit 45 for identification.")

That contract was performed by both the sellers and buyers and the sugar referred to therein was shipped from Java in the month of September 1920, the larger portion by the Steamer Chifuku Maru and the balance by the steamer Washington Maru. The Chifuku was destined for and ultimately arrived at Philadelphia, Pa.

Referring to Plaintiffs' Exhibit 44 for identification I was aware of its terms at the time of its delivery to Lamborn & Company. Its terms were performed by the parties thereto, the steamer West Cheswald arriving at Philadelphia, Pa. Sugar from that shipment was tendered to T. S. Southgate & Company in performance of Plaintiffs' Exhibit 39 for identification.

Plaintiffs' Exhibit 17a, dated December 23rd, 1920, was signed by me and was sent to the Bankers Trust Company with the shipping documents. Plaintiffs' Exhibit 17 for identification is a carbon copy of the letter that I have just identified as Plaintiffs' Exhibit 17a for identification.

[fol. 63] (NOTE.—Sheaf of papers handed witness are marked "plaintiffs' Exhibit 46 for identification.")

Those papers were served on me on or about December 15th, 1920, at No. 132 Front Street, New York City, at the office of Lamborn & Company. After December 15th, 1920, Lamborn & Company presented draft and shipping documents to the Bankers Trust Company. Exhibit 17a for identification was one of the papers presented with the draft and shipping documents. It was prepared on or about December 23rd, 1920. I saw Plaintiffs' Exhibit 18 at the time it was signed by me at the Company's office, being a sight draft for $48,009.81 drawn on the Bankers Trust Company, New York City, by Lamborn & Company. The endorsement thereon "Lamborn & Company" is in my handwriting. Accompanying these papers was an invoice in duplicate, dated December 20, 1920, amounting to $48,009.81, being Plaintiffs' Exhibits 20 and 20a for identification. Plaintiffs' Exhibit 19 for identification is a weight return covering 1,000 bags, of George J. Hoffman & Company, dated December 17th, 1920. Plaintiffs' Exhibit 21 for identification was signed by me and accompanied the papers sent to Bankers Trust Company on or about December 23rd, 1920, as did the original bill of lad-

ing covering a shipment of 1,000 bags. The photographic copy here exhibited as Plaintiffs' Exhibit 16 for identification is an accurate and true photographic copy of the front and back of the said railroad bill of lading. The original was endorsed by Lamborn & Company in blank, by Leonard Elsmith. He was authorized to sign the name of Lamborn & Company, being my assistant at that time.

Plaintiffs' Exhibit 24 for identification came to my attention at or about the time it is dated. The paper on the letterhead of the National Bank of Commerce, dated July 17th, 1920, was received by us on or about the 19th of July, 1920.

(NOTE.—Paper is marked "Plaintiffs' Exhibit 47 for identification.")

During the fall of 1920 we knew the course of the voyage of the steamship Chifuku Maru.

[fol. 64] The paper which you show me bearing the letterhead of the Bankers Trust Company, dated January 5th, 1921, marked "Plaintiffs' Exhibit 24 for identification," was seen by me on or about its date at our office. We have a file of correspondence produced purporting to have passed between Lamborn & Company and T. S. Southgate & Company; Lamborn & Company and Bankers Trust Company and Lamborn & Company and the defendant bank. Without referring to the contents of those papers I will state that those which are originals were received by Lamborn & Company at or about the date they bear, and that the carbon copies are copies of original letters sent to the addresses at or about the date therein state.

Note

Letter dated April 27th, 1920 from National Bank of Commerce of Norfolk, Va. to Lamborn & Company, is marked Plaintiffs' Exhibit 57 for identification.

Letter dated April 29, 1920 from Bankers Trust Company to Lamborn & Company, is marked Plaintiffs' Exhibit 58 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated May 1, 1920, is marked Plaintiffs' Exhibit 59 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, no date, is marked Plaintiffs' Exhibit 60 for identification.

Copy of letter from Lamborn & Company to Bankers Trust Company, dated May 1, 1920, is marked Plaintiffs' Exhibit 61 for identification.

Letter from Bankers Trust Company to Lamborn & Company, dated May 3, 1920, is marked Plaintiffs' Exhibit 62 for identification.

Letter from T. S. Southgate & Company to Lamborn & Company, dated May 4, 1920, is marked Plaintiffs' Exhibit 63 for identification.

[fol. 65] Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated May 6, 1920, is marked Plaintiffs' Exhibit 64 for identification.

Telegram from T. S. Southgate & Company to Lamborn & Company, dated May 7, 1920, is marked "Plaintiffs' Exhibit 65 for identification.

Copy of telegram from Lamborn & Company to T. S. Southgate & Company, no date, is marked Plaintiffs' Exhibit 66 for identification.

Telegram from T. S. Southgate & Company to Lamborn & Company, dated May 10, 1920, is marked Plaintiffs' Exhibit 67 for identification.

Letter from T. S. Southgate & Company to Lamborn & Company, dated May 11, 1920, is marked Plaintiffs' Exhibit 68 for identification.

Letter from National Bank of Commerce of Norfolk, Va., dated May 11, 1920, to Lamborn & Company, is marked Plaintiffs' Exhibit 69 for identification.

Copy of letter of credit from the National Bank of Commerce of Norfolk, Va., to Lamborn & Company, dated May 11, 1920, is marked Plaintiffs' Exhibit 70 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va. dated May 14, 1920, is marked Plaintiffs' Exhibit 71 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated May 14, 1920, is marked Plaintiffs' Exhibit 72 for identification.

Letter from National Bank of Commerce of Norfolk, Va. to Lamborn & Company, dated May 15, 1920, is marked Plaintiffs' Exhibit 73 for identification.

Carbon copy of letter from Lamborn & Company to Bankers Trust Company, dated June 10th, 1920, is marked Plaintiffs' Exhibit 74 for identification.

[fol. 66] Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated June 10, 1920, is marked Plaintiffs' Exhibit 75 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated June 10, 1920, is marked Plaintiffs' Exhibit 76 for identification.

Letter from Bankers Trust Company to Lamborn & Company, dated June 11, 1920, is marked Plaintiffs' Exhibit 77 for identification.

Carbon copy of letter from Lamborn & Company to Bankers Trust Company, dated June 15, 1920 is marked Plaintiffs' Exhibit 78 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce, dated June 15, 1920 (two pages) is marked Plaintiffs' Exhibit 79 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va. dated June 18, 1920, is marked Plaintiffs' Exhibit 80 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated July 9, 1920, is marked Plaintiffs' Exhibit 81 for identification.

Charles A. Godsell, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I reside at Ridgefield Park, N. J., and am employed by Lamborn & Company, Inc., and was employed by them in the years 1920 and 1921. I was in charge of the importation of foreign sugars, that is making up contracts, and was familiar with the ships carrying sugar that Lamborn & Company had consigned to them. In the course of my work for the year 1920 I followed the voyage of the steamship [fol. 67] Chifuku Maru. Referring to the month of November, 1920, I obtained information from the Maritime Register, an issue of some date in November, of her voyage. I saw the copy of the New York Maritime Register dated

November 17th, 1920, marked for identification "Plaintiffs' Exhibit 48," and noted the article on page 13 of the Register which reads: "Chifuku Maru, Jap. S. S. London, November 15th. A telegram from Port Said states that the steamer Chifuku Maru from Colombo, etc., for Philadelphia has arrived there with high pressure cylinder and piston damaged. Repairs will require about seven days."

I knew at that time that the Chifuku Maru had sugar for Lamborn and Company, and I called the notice to the attention of the members of the firm. They then proceeded to ascertain the extent of the damage and how long she would be laid up, through the Comet Forwarding Company, ship brokers and forwarders. Prior to this time I had communicated by letter with T. S. Southgate & Company and the letter marked "Plaintiffs' Exhibit 49 for identification" is the carbon copy of a letter dated August 30th, 1920, addressed to T. S. Southgate & Company, Norfolk, Virginia. The initials "C. G." in the corner of that letter are mine.

The paper dated 9/20/20 marked "Plaintiffs' Exhibit 50 for identification" is a carbon copy of a letter dated September 29th, 1920, addressed to T. S. Southgate & Co., Norfolk, Va. The initials "C. A. G." in the upper right-hand corner are mine. I composed and dictated the original of which this purports to be a carbon copy. It was a part of my duties to declare to consignees the names of steamers carrying sugar.

Plaintiffs' Exhibit 51 for identification is a carbon copy of a letter dated November 10th, 1920, addressed to T. S. Southgate & Company, Norfolk, Va., prepared and signed by me. It contained correctly and accurately the information that I then had concerning the steamer Chifuku Maru at that time. I did not know of the accident to the Chifuku Maru. In fact the accident did not happen until after that date.

Plaintiffs' Exhibit 52 for identification, dated December 13th, 1920, is a carbon copy of a letter dated December 13th, 1920, addressed to T. S. Southgate & Company, Nor-
[fol. 68] folk, Va. I composed and signed the original of which this purports to be a copy and it correctly states the information which Lamborn & Company had concerning the vessels therein mentioned on that date. Between the time

that I prepared Plaintiffs' Exhibit 51 for identification and Plaintiffs' Exhibit 52 for identification, that is, between November 10th, 1920, and December 13th, 1920, I was familiar with the accident to the Chifuku Maru. At or about that time I was aware of the efforts to get information with regard to said steamer. I saw the paper dated November 17th, 1920, a few days after that time.

(Paper marked "Plaintiffs' Exhibit 53 for identification.")

The paper which you show me dated November 17th, 1920, was seen by me before December 13th.

(Paper marked "Plaintiffs' Exhibit 54 for identification.")

I don't think I saw the paper dated November 19th, 1920. I saw what purports to be a letter dated November 24th, 1920, shortly after that date and before December 13th.

(Paper marked "Plaintiffs' Exhibit 55 for identification.")

I did not see what purports to be a cablegram dated November 23rd, 1920, and have not seen it before today. A short time after its date I saw what purports to be a copy of a cable dated December 10th and marked received December 11th, probably about the 12th or 13th of the month.

(Paper marked "Plaintiffs' Exhibit 56 for identification.")

It was before I prepared and sent the letter which I have identified as Plaintiffs' Exhibit 52 for identification, dated December 13th, 1920.

[fol. 69] JOHN BOHAN, being recalled as a witness for the plaintiff, testified as follows:

By Mr. Bentley:

I saw the Chifuku Maru in Philadelphia, in the month of February 1921, during the first week in February that is, somewhere around the 4th.

Testimony for Defendant

A. E. WHARTON, being duly sworn, testified on behalf of the defendant as follows:

Examined by Mr Taylor:

My name is A. E. Wharton. I reside in the Baylor Apartment, Norfolk, Virginia, and am Cashier of the National Bank of Commerce.

In May 1920 I was assistant cashier of that Bank.

I prepared the original letter of credit that has been introduced in this suit, and signed the same as Assistant Cashier, and the credit established thereby was established as provided therein and on the terms and conditions therein contained.

Subsequent to the issuance of that letter of credit there was a modification of the same consisting of the elimination of the requirement of the ocean bill of lading. There has not been any other modification. The draft drawn against the letter of credit was not paid because our information was that the terms of the credit had not been complied with.

Whereupon the following question was asked:

Q. Why did you decline to pay it?

A. You want me to elaborate?

Q. Tell your reason in full to the jury?

A. We had information that the ship on which the sugar was tendered has been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia. [fol. 70] We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying.

We afterwards ascertained that our information on the subject was correct and acting on that information we declined payment. We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of Credit.

Witness retired without cross examination.

D. M. THORNTON, being introduced on behalf of the defendant, and duly sworn, testified as follows:

Examined by Mr. Taylor:

My name is D. M. Thornton. I am thirty-four years old and reside at 1048 Cambridge Crescent, and am a salesman for T. S. Southgate & Company. I have been connected with that firm for eleven years and am a member of the firm. In May 1920 I was Sales Manager.

I originally placed the order with Lamborn & Company for 1,000 bags of Java sugar. The sugar was to be Java white sugar. The letter of credit sued on was procured at the instance of my firm and forwarded direct by the National Bank of Commerce to New York. It was issued in accordance with my request and I am familiar with its terms. There was a modification of the original terms consisting of the elimination of the ocean bill of lading. There was never any other modification or change in the letter of credit and the modification just spoken of was made at my instance and done with my approval.

It is a fact that the requirement of the contract with Lamborn and the letter of credit were identical. This is true as to the time and place and destination. As I have said it was issued at the instance of Southgate & Company and Southgate & Company agreed to the modification. We never agreed to any modification or departure from the terms of that letter of credit other than the modification as to the ocean bill of lading, and Southgate & Company never [fol. 71] received the sugar provided for in the letter of credit. No sugar was ever received pursuant to that letter of credit by Southgate & Company because the sugar tendered was not tendered in compliance with the terms of the letter of credit, in that the vessel was until two days prior to its arrival at Philadelphia, consigned to New York.

I am in general familiar with the usages and practice of ocean transportation, such being a part of my duties in connection with Southgate & Company. T. S. Southgate & Company was at all times ready, able and willing to take the sugar shipped in accordance with the letter of credit.

Witness retired without cross-examination.

Whereupon the defendant rests.

NOTE.—At this point it was stipulated by and between counsel that Plaintiffs' Exhibit No. 6 in evidence be withdrawn by consent of the court, and there be substituted therefor a true photographic copy thereof, bearing the same number. Such photographic copy was duly substituted.

The foregoing is the substance in narrative form of all of the evidence taken in this cause on behalf of both the plaintiffs and defendant, both in Court at the trial and by depositions, together with all exhibits referred to therein and introduced both in the trial in Court and with said depositions, the originals of which depositions, together with all the exhibits referred to, pursuant to agreement betwe-n the parties and in accordance with the rules and practice of this Court and of the United States Circuit Court of Appeals for the Fourth Judicial Circuit, are to be certified by the Judge of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Fourth Judicial Circuit at Richmond, to be used and considered upon the hearing of said cause on appeal.

MOTIONS FOR DIRECTED VERDICT AND RULING THEREON

Whereupon counsel for the plaintiffs moved the Court to direct the jury to find a verdict in favor of the plain-
[fol. 72] tiffs for the amount alleged in the notice of motion herein filed, and counsel for the defendant moved the Court to direct the jury to find a verdict for the defendant on the same grounds as urged in the motion to direct a verdict at the termination of the plaintiffs' evidence as heretofore set out.

Upon due consideration by the Court the motion by counsel for the plaintiffs to direct a verdict in favor of the plaintiffs was granted and the motion by counsel for defendant to direct a verdict in favor of the defendant was overruled.

Whereupon the defendant noted exceptions to these rulings.

Charge to Jury

The Court thereupon charged the jury as follows:

"Gentlemen of the jury, in the case we have been trying since yesterday, I have had the real issues in the case presented to me for my decision on the law. You gentlemen will recall that I told you a great many times during this court that the jury are the judges of the facts. Where there is a question of fact for which there is any occasion for determination or decision to reach the right of the case, that decision is exclusively one for the jury. Where the question involved is one of law, the responsibility is that of the court.

In this case, as I see it, there is no question of fact involved. The whole matter involved in the case is dependable upon the legal determination of the undisputed, admitted facts. That being true, gentlemen, after having heard the arguments of counsel at great length, I have concluded that the plaintiff in this case is entitled to a verdict for the full amount sued for, $48,009.81, and I am therefore compelled to instruct you to find a verdict for the plaintiff for that amount, with interest from the 7th day of January, 1921."

Verdict

Upon the completion of which charge the jury rendered their verdict in the words and figures following:

"We, the jury under the direction of the Court, find [fol. 73] for the plaintiffs and assess their damages at the sum of $48,009.81 with interest thereon from January 7, 1921.

R. P. Bunting, Foreman, this Nov. 20, 1923."

Motion to Set Aside Verdict and Order Overruling Same

And thereupon the defendant by counsel moved the Court to set aside the said verdict on the ground that the same

was contrary to the law and evidence and on the ground of error on the part of said Court in charging said jury and in directing a verdict for the plaintiffs as hereinabove set out, but the Court refused to grant the said motion of the defendant and overruled the same and proceeded to enter a judgment thereon, to which the defendant by counsel excepts and tenders this its bill of exceptions to said action of said Court in overruling its said motion to direct a verdict in favor of the defendant at the termination of the plaintiffs' evidence, and in overruling the defendant's motion to direct a verdict in favor of the defendant at the termination of all of the evidence and in directing a verdict in favor of the plaintiffs at the termination of all of the evidence, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done, to have the same force and effect as to each of said exceptions as if each were set forth and contained in a separate bill of exceptions.

Given under my hand this 11th day of February, 1924.

D. Lawrence Groner, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER STAYING PROCEEDINGS—Filed February 11, 1924

The defendant, The National Bank of Commerce of Norfolk, a national banking association, having on the 11th day of February, 1924, filed its petition for a writ of error from the verdict and judgment made and entered herein, to the United States Circuit Court of Appeals for the Fourth Circuit, together with assignments of error, within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and [fol. 74] furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and said petition having been duly allowed, now, therefore:

It is ordered, that upon said defendant's filing with the Clerk of this Court a good and sufficient bond in the sum of Fifty Thousand Dollars ($50,000.00) to the effect that if the said defendants and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fail to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by this Court, that all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed February 11, 1924

The defendant in this action, in connection with its petition for writ of error, makes the following assignments of error, in which it avers the Court erred:

1. The Court erred in failing to sustain the motion of the defendant to direct a verdict in its favor at the completion of the plaintiffs' evidence.

2. The Court erred in failing to sustain the defendant's motion to direct a verdict in its favor at the completion of all the evidence in the case.

3. The Court erred in sustaining the motion of the plaintiffs to direct a verdict in their favor upon the completion of all the evidence in the case.

[fol. 75] 4. The Court erred in refusing to grant the motion of the defendant to set aside the verdict in favor of the plaintiffs, rendered under the direction and order of the Court, and grant it a new trial, said motion having been seasonably made after the rendering of the verdict.

5. The Court erred in entering up judgment in favor of the plaintiffs on the verdict so rendered by the jury under its order and direction.

6. The Court erred in respect to the law applicable to and controlling the rights of the parties to this cause.

7. The Court erred in holding that the railroad bills of lading tendered in this case and upon which payment under the letter of credit was demanded, which showed a shipment of Java sugar was a compliance with the letter of credit, which provided for a shipment of Java white sugar.

8. The Court erred in its construction of the following provision of the letter of credit:

"Shipment to be made during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia;

its construction being to the effect that a shipment on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13th, 1920, to Philadelphia, was a compliance by the plaintiffs with the terms and provisions of said letter of credit.

9. The Court erred in holding that the plaintiffs, after having declared the "Chifuku Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had authority to subsequently declare another vessel, even though said other vessel complied in all particulars with the terms of the letter of credit so far as the [fol. 76] time, place and destination of the shipment was concerned, which said substituted vessel in this case did not comply with.

10. The Court erred in holding that the sugar actually tendered and which was shipped on the "West Cheswald" was so shipped during the months of August-September, 1920, as provided by the terms of the letter of credit, but the said questions should have been submitted to the determination of the jury under all the facts and circumstances of the case.

Wherefore, defendant prays that said verdict be set aside and said judgment be reversed.

Tazewell Taylor, Attorney for the National Bank of Commerce of Norfolk, Defendant in the Above entitled Action.

IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 11, 1924

It is stipulated and agreed between counsel for the plaintiff in error and counsel for the defendants in error that the Clerk of this Court shall make up a transcript of the record in this case and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Judicial Circuit at Richmond, Virginia, and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

It is further agreed that the transcript of record shall consist of the following papers:

1. Plaintiffs' notice of motion for judgment with all exhibits, if any, thereto attached;

2. Defendant's pleas with all exhibits, if any, thereto attached, and its statement of the grounds of defense;

[fol. 77] 3. Orders on trial, verdict and judgment of the Court;

4. Bills of Exception and assignments of error;

5. Petition for writ of error; order allowing writ of error, supersedeas bond, and writ of error, to be certified up as required by the rules of the United States Circuit Court of Appeals;

6. All exhibits received in evidence, or offered for identification, either in open court or with depositions, which are not embodied in the bills of exception, together with all stipulations between counsel, to be certified up by the Judge of this Court as original exhibits.

Tazewell Taylor, Counsel for Plaintiff in Error.
Baird, White & L., Counsel for Defendants in Error.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD

(1) Petition for Writ of Error filed Feb. 11, 1924.

(2) Order allowing Writ of Error, Entered & Filed February 11th, 1924.

(3) Writ of Error dated February 11th, 1924. Copy of Writ of Error lodged for adverse party February 11, 1924.

(4) Citation dated February 11th, 1924. Service accepted.

(5) Appeal Bond, filed February 28th, 1924. Obligors The National Bank of Commerce of Norfolk, Va., Principal, and the American Surety Company of New York, Surety. Penalty $50,000.00. Condition for all damages and costs, etc.

[fol. 78] Clerk's certification to foregoing transcript omitted in printing.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2231

THE NATIONAL BANK OF COMMERCE OF NORFOLK, Plaintiff in Error,

versus

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, Harry B. Hutchins, Clarence C. Troup, Karl E. Lindgren, George H. Logan, Victor R. Hess, N. Nelson Keen, B. Wheeler Dyer, and William V. Wood, Partners, Trading and Doing Business as Lamborn and Company, Defendants in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

MINUTE ENTRIES

March 12, 1924, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Tazewell Taylor is entered for the plaintiff in error.

March 14, 1924, the appearance of Edward R. Baird, Jr., and H. G. Connor, Jr., is entered for the defendants in error.

Same day, the original exhibits (car records, etc.) are certified up.

March 29, 1924, twenty-five copies of the printed record are filed.

[fol. 80] Minute entry of argument and submission May 29, 1924, omitted in printing.

In United States Circuit Court of Appeals

[Title omitted]

(Argued May 29, 1924. Decided October 21, 1924.)

Opinion—Filed October 21, 1924

Before Woods, Waddill, and Rose, Circuit Judges

[fol. 81] Tazewell Taylor for Plaintiff in Error, and H. G. Connor, Jr., and Edward R. Baird, Jr., (Baird, White & Lanning; Van Doren, Conklin & McNevin; Louis O. Van Doren and Alfred C. B. McNevin on brief) for Defendants in Error.

Rose, Circuit Judge:

This is another sugar case. Those concerned in the transactions out of which it arose will be referred to as the Seller, the Buyer and the Bank. Only the first and last of these are parties to this litigation. The Seller was plaintiff below and is defendant in error here. It is a partnership trading as Lamborn & Co. and is composed of nearly a dozen persons, everyone of whom is a citizen of some other state than Virginia.

On the 23rd of April, 1920, it entered into a written contract with the Buyer, Southgate & Co. of Norfolk, Virginia, by the terms of which it sold the latter 1,000 bags of Java white sugar of about 224 pounds to the bag, 10% more or less at 22c per pound, duty paid, f. o. b. cars Philadelphia, landed weights. The sugar was to be shipped during

August/September at the option of Seller from Java, by steamer or steamers to Philadelphia. The names of such steamer or steamers were to be declared later. Should the steamer or steamers declare against the contract fail to arrive at the port of destination for any cause, Seller was to be relieved of responsibility under the contract. It was further provided that in case there was damage to the sugars in transit to Philadelphia preventing Seller from making full delivery, Seller was to deliver to each purchaser of sugar aboard that steamer a proportionate part of the sound packages. Payment was to be made net cash on presentation of sight draft with invoice and bill of lading attached. Buyer was to open within five days, confirmed irrevocable letter of credit in favor of Seller for the full invoice value of the 1,000 bags. If unforeseen circumstances, such as embargoes, Government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc. prevented shipment within the time specified, the Buyer had the option of cancelling the portion of the contract affected by the delay or taking the sugar [fol. 82] so affected for later shipment without claiming damages. The Buyer's decision was to be given immediately upon advice of the Seller that delay had occurred. In the event of such cancellation by the Buyer, the Seller was to be under no further obligation under the contract.

A letter of credit was promptly opened but because it was not worded in some respects as the Buyer and Seller desired, it was withdrawn and another dated May 11, 1920, was issued in its place by the Bank, the National Bank of Commerce of Norfolk, Virginia. It is upon this latter document that the Seller is here seeking to recover from the Bank. It was for $53,123.84, a sum arrived at by figuring what the Buyer would owe the Seller if the amount of sugar exceeded by the permissible 10% the 1,000 bags at 224 pounds each. In that event there would be delivered 246,400 pounds of sugar which at 22c per pound would foot up $54,208.00, from which by the terms of the contract, 2% or $1,084.16 would be deducted leaving the amount for which letter of credit was issued. Apparently when the letter was received by the Seller it did not notice that it contained the provision that before payment could be demanded by the Seller, the latter must present to the Bank or rather

to the Bankers Trust Co. of New York through which the credit was made payable, a sight draft with invoice and copy of ocean bill of lading covering shipment Java to Philadelphia and order notify bill of lading, the latter bill of course being the one to be issued by the railway carrier to whom in accordance with the contract the sugar was to be delivered f. o. b. cars at Philadelphia. In the contract the Seller had bargained to attach to the draft only the invoice and bill of lading, by which it understood the railroad bill. When the Seller realized that the letter of credit required it to present with its draft a copy of the ocean bill of lading as well, it took up the matter with the other parties, writing on the 10th of June that the sugar was being shipped from Java in cargoes of thousands of tons and as each cargo would include the sugars intended for a number of different purchasers, it would be impracticable to furnish to each of these a copy of the ocean bill of lading. Some correspondence ensued and finally on the 15th of July, the Bank notified the Seller that it had been authorized by the Buyer to eliminate the copy of the ocean bill [fol. 83] of lading covering shipment from Java to Philadelphia. It added that all other terms and conditions in the credit were to remain as theretofore. One of these other terms which consequently was unchanged was that which was headed "Shipment" and which reads as follows "Shipment to be made during August/September, 1920, at option of the Sellers from Java by steamer or steamers to Philadelphia." When in December the sugars arrived in Philadelphia and were put upon the cars and the Seller's draft was presented, the Bank refused payment. It says that it was entitled to do so because the sugars were not shipped from Java to Philadelphia.

There is no dispute as to facts. The controversy is as to the legal effect of that which admittedly took place. On the 30th of August, the Seller had notified the Buyer that the sugars were going forward by the Chifuku Maru or the Washington Maru or substitutes. Nearly a month later and within one day of the expiration of the time during which the Seller was bound to ship the sugar from Java, it wrote the Buyer that the Chifuku Maru was carrying the latter's sugars and was due to arrive the latter part of October. On November 10th, it again wrote the Buyer

that the sugars were to arrive in Philadelphia the last half of November on the Steamship Chifuku Maru. There was shipped in that steamer from Java to Philadelphia, a full cargo of sugar including much more than the amount which the Seller had contracted to deliver to the Buyer. Unfortunately the Steamship developed engine trouble of so serious a character, that it became evident that it might be forced to remain at Port Said for an indefinite period. The Seller had on board the Steamship West Cheswald sugars which before the end of September had been shipped on her from Java to New York. On the 11th of December that vessel was within about three days' sail of her destination. The price of sugar had by that time fallen to a fraction of that which the Buyer had agreed to pay and doubtless the Seller was anxious that there should be no departure on its part from the terms of the contract, and it might be that the Chifuku Maru would never get to Philadelphia. It occurred to the Seller that the West Cheswald might be diverted from New York to Philadelphia and accordingly on the 11th the Seller took up the matter with [fol. 84] the agents of that ship and asked whether such agents would consider the sending of her to Philadelphia instead of to New York. The reply was it would all depend on how the Seller's sugars were stored. A radiogram was thereupon sent to the master of the ship directing him to radio immediately amount general cargo and sugar aboard, how stored and if Lamborn's sugar could be discharged without moving other cargo. He replied that the Lamborn's sugar would be available without moving other cargo and must be discharged first, and added the ship was due to arrive about December 14th. At the time the ship was somewhere in the neighborhood of the Bermudas. The Shipping Board which was the owner of the West Cheswald was communicated with and asked if it would consider sending that ship to Philadelphia instead of New York. The Board authorized the diversion of the steamer to Philadelphia at an additional freight charge of $1.00 per ton and on the afternoon of December 13, the Seller accepted the Shipping Board's terms and agreed to pay $3,572.00 the extra freight on its sugars. Thereupon, on the 13th, the West Cheswald by radio was directed to proceed to Philadelphia. The ship reached the Delaware breakwater by

midnight of the 14th and apparently arrived at Philadelphia a few hours later.

The Courts, State and Federal, in at least four other cases, have had before them tenders, by this Seller, under similar contracts to that here involved, of sugars brought by the West Cheswald to Philadelphia. Wilbur vs. Lamborn, 276 Pa. State 479; Matthew Smith Tea, Coffee & Grocery Co. vs. Lamborn, 276 Fed. 325; Swift vs. Lamborn, 200 N. Y. Supp. 292; Williams Ice Cream Co. vs. Chase National Bank, 199 N. Y. Supp. 314, affirmed by the Appellate Division of the Supreme Court of New York for the First Department in June of this year, in an opinion which we have seen but which has not yet been reported. In every one of these, as well as below in the instant case, it was held the buyers were bound to receive and pay for the sugars. In most of them the question principally discussed was whether the Seller had the right under the contract to declare the West Cheswald as and when it did. The Buyers contended that letters of August 30, September 29 and November 10 from the Seller, identical in phraseology [fol. 85] with those of the same dates above referred to, amounted to a final declaration of the Chifuku Maru which could not be subsequently changed without the consent of both Buyer and Seller. That particular defense is not open to the Buyer in the instant case because its letter of credit contains no requirement for a declaration. Apparently the letters of credit procured by the buyers in the other litigated cases were equally silent on that point, a circumstance which doubtless explains why in them the controversy took the form either of an application by a buyer for an injunction to prevent payment on the letter of credit or of a suit by the buyer against the seller to recover what the latter had received upon such letter. The right of the Seller to declare the West Cheswald when and as it did was sustained by every one of the Courts which felt called to pass upon that question. It is not before us and we are not called upon to say anything about it.

In two of the cases, namely, Swift vs. Lamborn, supra, and Wilbur vs. Lamborn, supra, as well as by the learned judge below in the one now at bar, something was said as to the contention upon which we are required to pass, namely, whether the "shipment" of sugars on the West Cheswald was made "from Java by steamer or steamers

to Philadelphia." In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority.

In Williams Ice Cream Co. Inc. vs. Chase National Bank, the learned Judge in the Court of the first instance who heard the case thought it sufficient to say "the plaintiff urges the sugar was not a shipment from Java to Philadelphia, but to New York." "In other words the shipment is not the course that a designated vessel takes but the course it was intended it should take. This refinement it seems to me is more one of sophistry than reason and carries with it a failure of conviction." In the Appellate Division this particular point is not noticed at all. The Supreme Court of Pennsylvania in Wilbur vs. Lamborn was almost as brief. "Some point is made of the fact that the West Cheswald was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the contract. Plaintiff was concerned only with the delivery of the merchandise and that there should be no delay in its arrival. It was delivered as the [fol. 86] result of a continuous voyage from Java to Philadelphia. These contracts did not say that the sugar shall be shipped by continuous voyage from the place of shipment to the destination, what they provide is that the shipment shall be from Java by steamer or steamers to Philadelphia. Even if they did so provide, we might not be prepared to hold—under the facts here appearing that the voyage was not in reality a continuous one—although the first destination of the ship was New York,—that this latter circumstance would avoid the contract." From the report of the case it appears that Filley vs. Pope, 115 U. S. 213, was cited by counsel but is not referred to by the Court. In the instant case the learned Judge below said "the letter of credit is complied with it seems to me by the shipment within a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time from the inception of the voyage, an intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be in compliance with the

contract. It would be all that reason and fair play and justice would require. I was very much interested in the Supreme Court case and of course if it is parallel with this, I shall have to follow it and be bound by it, but I do see a difference in a shipment from Leith and a shipment from Glasgow. The delivery of this shipment to New York would have been unquestionably a non-compliance with the contract which would have avoided this letter of credit so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract notwithstanding the precise quantity and the precise quality of sugar was furnished but to say that although the exact terms of the contract were complied with because it was not the purpose or not the intention or not the arrangement that what was done should be done at the beginning vitiated this guarantee, it seems to me is going farther than I think I have the right to go." The Supreme Court case referred to in the above quotation was of course, Filley vs. Pope, supra. In it a Scotch iron master by contract with a resident of St. Louis, sold the latter 500 tons of pig iron [fol. 87] and undertook that shipment should be from Glasgow as soon as possible. It appeared that the seller's iron works were about equally distant from Glasgow on the west coast of Scotland and from Leith on the east, and that in the ordinary course of trade, shipments were made indifferently from either. At the time of the sale, no vessel from Glasgow was immediately available and the only ship by which prompt transportation was possible was about to leave Leith. The seller accordingly put the iron upon her and it arrived at its destination earlier than it could possibly have done had it gone from Glasgow. The trial Court held that the provision "That the iron was to be shipped from Glasgow was not a material provision", "that the purpose of the contract was the sale" of a certain quantity of iron to be delivered at a certain place and that the fact "that it was shipped from Leith instead of Glasgow was not material to the rights of the parties." That point of view is in substance the same as that which has commended itself to the Courts which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Phila-

delphia, it made no difference that when the shipment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York. In Filley vs. Pope, however, the Supreme Court held that the contract was a mercantile one, as that now at bar is, and that in such a contract "a statement descriptive of the subject matter or some material incident such as time or place of shipment is ordinarily to be regarded as a warranty or a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

Referring to the case of Norrington vs. Wright, 115 U. S. 188, decided on the same day, Mr. Justice Gray said that "the provision in that case related to the time; in this it relates to the place of shipment," as in the case now at our bar it related to the place to which the shipment was to be made. The Supreme Court said it was not "merely 500 tons of iron of a certain quality" that was sold, nor was "it such iron to be shipped as soon as possible from any Scotish port or ports, but it "was" iron of that quality [fol. 88] to be shipped from the particular port of Glasgow as soon as possible." "The Court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow, instead of using the more general phrase of shipment from Scotland or merely shipment without naming any place, but it is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment nor does the buyer agree to accept iron shipped via any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in procuring the voyage from Glasgow to New Orleans, but he does not take the risk of delay or of sea perils which may occur in the course of a different voyage from Leith to the same destination."

"One or two illustrations may help to make this clear. If the sellers had shipped the iron at the first opportunity from Glasgow, the buyer could not have refused to accept it even if it could have been shipped sooner from Leith.

Again, the buyer would have an insurable interest in iron during the voyage by reason of the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market but a policy of insurance on the iron for a voyage from Glasgow would not cover a voyage from Leith." Just as in this case although the title to the sugar was not to pass until its delivery f. o. b. cars Philadelphia, the buyer had an insurable interest in it and had the sugar market continued to advance, he might well have desired to insure the gain he would make from his contract, and insurance affected on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York. Murray vs. Columbian Insurance Co., 4 Johns 443.

In the case before us the parties had definitely bargained for a "shipment" "from Java to Philadelphia," as in Filley vs. Pope they did for a shipment "from Glasgow." Some of the Courts which have upheld the contention of the Seller in cases arising out of sugars tendered from the West Cheswald have done so because in their view whether the shipment was to Philadelphia depended on [fol. 89] the voyage the ship actually made and not upon the one she started out to make and for which she issued her bills of lading. If they are right, they were of course justified in holding that Filley vs. Pope was not a controlling authority. The Bank, however, argues that in mercantile contracts such as this the word "shipment" has a definite meaning. When it is used in connection with the time or place at or the destination to which it is to be made, it has reference to the conditions which existed at and before the sailing of the ship and that therefore the sugar tendered under the letter of credit was a shipment not "to Philadelphia" but "to New York." If that be so, Filley vs. Pope is necessarily decisive of the controversy.

In Norrington vs. Wright, supra, the Supreme Court cited with approval Bowles vs. Shand, 2 App. Cases 455. In that case a contract was made in London, for the sale of 6,000 tons of Madras rice to be shipped at Madras or coast during the months of March and/or April, 1874, per Rajah of Cochin. The 6,000 tons filled 8,200 bags of which 7,120 were put on board and bills of lading signed in February and for the rest, consisting of 1,030 put on

board in February and 50 in March, the bill of lading was signed in March. The House of Lords held the seller could not require the buyer to accept the rice because the meaning of the contract, as apparent upon its face, was that all of the rice must be put on board in March and April or in one of those months. The shipment took place when the rice was put on board the ship and what was then done, determined the time and character of the shipment, precisely as whether the shipment of the sugar in the case at bar was made to New York or Philadelphia was necessarily determined when, the sugar being on board the ship, the bills of lading for it were issued.

In answer to a suggestion similar to one which seems to have had much weight with some of the Courts which have considered the contract now in controversy, viz, that it made no difference to the Buyer whether the sugar was originally consigned to New York or to Philadelphia, Lord Chancellor Cairns said, "it does not appear to me to be a question for your Lordships or for any Court to consider whether this is a contract which bears upon the face of it some reason, some explanation why it was made in that [fol. 90] form and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing in their contracts stipulations to which they do not attach some value and importance. If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace that literal meaning to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that it is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices have dropped. The non-fulfillment of any term of the contract is a means by which a purchaser is able to get rid of the contract when prices have dropped but that is no reason why a term which is in a contract should not be fulfilled." In the same case that eminent authority on the law of sale, Lord Blackburn said "if the description of the

article tendered is different in any respect it is not the article bargained for and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras; probably equally good rice might have been shipped in February as was shipped in April, and I dare say, equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin, but the parties have chosen, for reasons best known to themselves, to say we bargained to take rice shipped in this particular region, at that particular time, on board that particular ship and before defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article they have bargained for otherwise they are not bound to take it."

The same principle was applied by Lord Chief Justice Russell in Ashmore & Son vs. Cox & Co., L. R. 1899, 1 Q. B. 436. In that case 250 bales of Manila hemp were sold, ship-[fol. 91] ment to be made from a port or ports in the Philippine Islands by sailor or sailors direct or indirect to London, between May 1 and July 31. No hemp was shipped by the seller by sailor or sailors, nor during the time limited, but on September 15, it did ship 250 bales of Manila hemp by a steamship which was expected to arrive and did arrive in London about the same time as the sailing ship would have arrived, had it sailed July 31. It was held that the date of shipment and that it was to be made by a sailor or sailors was binding. In that case it was urged precisely as it has been at bar, that all the buyer was interested in was that goods of the kind and quality he had bargained for should arrive at the time and place originally contemplated.

Few men have been more deeply learned in mercantile law than Mr. Justice Scrutton. In Landauer vs. Craven & Speed Bros., L. R. 1912, 2 K. B., 94, he passed upon a case in which 500 bales of Manila hemp had been sold for delivery at London. The terms of the contract gave much liberty to the seller and by so doing indicated that the buyer was chiefly interested in the ultimate delivery of the hemp to him. It was agreed the shipment might be made from any recognized shipping port or ports in the

Philippine Islands or from Hong Kong or Singapore at any time within a three months interval between October 1 and December 31. The shipment might be direct or indirect. It was in fact made from Manilla in due season but on a bill of lading which called for delivery at Hong Kong. At the last named port, subsequently to December 31, the hemp was put upon another ship and there was issued for it a new bill of lading from Hong Kong to London. Mr. Justice Scrutton held that the seller was bound within the time named in the contract to ship at the port of shipment goods of the description contained in the contract and on shipment to procure a contract of affreightment under which the goods would be delivered at the destination contemplated by the contract. He said if when the seller ships goods sold C. I. F. London, he has no contract for carriage to London but only an intention to make one, he cannot forward this and tender an intention to the buyer. He further said that a seller C. I. F. must ship his goods under a contract for conveyance to the port of destination which can be transferred and not under a con-[fol. 92] tract for part of the way and to take another which cannot be transferred. Now it is true as it is pointed out by the learned counsel for the Seller that the contract here is not a C. I. F. contract but it is one under which the Buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle. Moreover, at all events, Landauer vs. Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson vs. Hamel & Horley, L. R. 1922, 2 App. Cases 36.

We in the past have had more than one occasion to hold that in mercantile contracts, the Courts must give effect to every term in the bargain the parties have chosen to make and are not at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in the Manhattan, 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was

brought in the substitute—From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the West Cheswald, it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchaser from escaping from a bad bargain by taking advantage of a variation from the terms from which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice Gray in this country and from Lords Cairns and Blackburn in England. Our examination of the cases which in this country and across the water have put a definite interpretation on the meaning of the word "shipment" as used in contracts of the character of that with which we are [fol. 93] here concerned, has convinced us that the instant case is not distinguishable from them and is governed by what the Supreme Court there said.

It follows that the learned Court below erred in rejecting the prayer of the defendant for a directed verdict in favor and in consequence, the judgment below must be reversed and the case remanded for a new trial.

Reversed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed October 22, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis- [fols. 94-99] trict Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the

United States for the Eastern District of Virginia, at Norfolk, with directions to set aside the verdict and grant a new trial in accordance with the opinion of this Court.

John C. Rose, U. S. Circuit Judge.

October 22, 1924.

Petition for Rehearing, covering six pages, omitted from this print. It was denied and nothing more by order December 20, 1924.

[fol. 100] In United States Circuit Court of Appeals

Minute Entry

November 20, 1924, petition of defendants in error for a stay of the mandate pending their petition for a rehearing filed.

In United States Circuit Court of Appeals

Order Staying Mandate—Filed November 24, 1924

Upon the Application of the defendants in error, by Baird, White & Lanning, their attorneys, and it appearing to the Court that a petition for rehearing has been presented by the defendants in error,

It is Ordered that the mandate of this Court in this cause *me*, and the same is hereby, stayed pending the action of the Court on said petition for a rehearing.

John C. Rose, Circuit Judge.

November 24, 1924.

In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—Filed December 20, 1924

[fols. 101 & 102] This Court having at its October term, 1924, rendered its decision reversing the judgment of the

said District Court in this case, and the defendants in error having on November 20, 1924, presented to the Court a petion for a rehearing of the said case, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied at the cost of the defendants in error. Let mandate issue after the expiration of five days.

John C. Rose, U. S. Circuit Judge.

December 20, 1924.

In United States Circuit Court of Appeals

Minute Entry of Mandate

On another day, to-wit, December 27, 1924, the mandate of this Court in this case is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original petition for writ of error, order allowing writ of error, and bond are returned to the Clerk at Norfolk, Va.

Same day, the original exhibits are returned to the Clerk at Norfolk, Va.

[fol. 103] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

At Law. No. 3699

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN, and B. WHEELER DYER, surviving partners, Trading and Doing Business as Lamborn & Company,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

NOTICE OF MOTION FOR JUDGMENT—Filed April 7, 1921

To the National Bank of Commerce of Norfolk, Norfolk, Virginia, a corporation chartered and existing under the laws of the State of Virginia, with its principal office and place of business in the city of Norfolk in said State:

Take notice that the undersigned will move the District [fol. 104] Court of the United States for the Eastern District of Virginia, at Norfolk, in its court room in said city of Norfolk, Virginia, on Monday, May 2, 1921, between the hours of 10:00 a. m. and 2:00 p. m. on that day, or as soon thereafter as it can be heard, for a judgment in its favor against you for the sum of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in said letter set forth, the undersigned having sold and delivered

one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit, amended as aforesaid, and in all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment whereof has been duly made, and payment thereof has been refused and declined. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of $10,000. You are a resident of the State of Virginia, and each of the undersigned is a resident of a state other than the State of Virginia.

Arthur H. Lamborn, a citizen of New Jersey; Gerard P. Tameling, a citizen of New York; Chas. C. [fol. 105] Riggs, a citizen of New Jersey; Henry B. Hutchings, a citizen of New Jersey; Clarence G. Traup, a citizen of New Jersey; Karl E. Lindgren, a citizen of Pennsylvania; Geo. H. Logan, a citizen of New Jersey; Victor R. Hess, a citizen of New York; N. Nelson Keen, a citizen of New Jersey; B. Wheeler Dyer, a citizen of New York; William V. Wood, a citizen of New Jersey; partners, trading and doing business as Lomborn & Company, by Baird, White & Lanning, Counsel.

In United States District Court

Denial of Liability and Plea of General Issue—Filed April 11, 1921

The said defendant, The National Bank of Commerce of Norfolk, by its attorney, comes and says that it did not

undertake or promise in the manner and form as the said plaintiffs have above hereof complained.

And of this the said defendant puts itself upon the country.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

STATEMENT OF GROUNDS OF DEFENSE—Filed May 3, 1921

And now comes the defendant, the National Bank of Commerce of Norfolk, by counsel, and states that its grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every the allegations contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defense which may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies and calls for strict proof of each and every [fol. 106] item of the charge relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STATEMENT OF GROUNDS OF DEFENSE—Filed October 23, 1923

And now comes the defendant, The National Bank of Commerce of Norfolk, by counsel, and states that its grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every allegation contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defence that may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies, and calls for strict proof of, each and every item of the charges relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

4. It relies upon the fact that the letter of credit, which is the subject of this action, contemplated the delivery by the plaintiffs of Java White Sugar, whereas the railroad bill of lading, together with other documents tendered by the plaintiffs and upon which payment under the letter of credit was demanded, did not show a shipment of Java White Sugar, but, on the contrary, simply Java Sugar there being at least fourteen varieties of Java Sugar.

[fol. 107] 5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

"Shipment to be male during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia."

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13th, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia.

6. It relies upon the fact that the plaintiffs having declared the "Chifuku Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had no authority to subsequently declare another vessel, even though said vessel complied in all particulars with the terms of the letter of credit so far as the time, place and destina-

tion of the shipment was concerned, which said substituted vessel in this case did not comply with.

7. It relies upon the fact, in addition to all of the other defences hereinabove made, that the sugar actually tendered was not shipped on the "West Cheswald" during the months of August-September, 1920.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND NOTICE OF MOTION FOR A JUDGMENT—Filed November 19, 1923

On motion of the plaintiffs, leave is given them to amend the notice of motion for a judgment herein, and the same is accordingly amended so that said motion shall contain the [fol. 108] averment that the National Bank of Commerce of Norfolk is chartered under the National Banking Laws of the United States, instead, as alleged in the notice of motion for a judgment, under the laws of the State of Virginia.

D. Lawrence Groner, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND NOTICE OF MOTION FOR JUDGMENT, WITHOUT PREJUDICE, ETC.—Filed February 23, 1925

This day came the parties, by counsel, and on motion of the plaintiffs leave is given them to file their amended notice herein, and to which motion said defendants objected on the ground that the same undertakes to vary and contradict the terms of a valid written instrument as construed by the Circuit Court of Appeals in this case, to the overruling of which defendants excepted, and the same is accordingly filed, and the said original notice amended by putting a period after the words,

"Less two per cent duty, of the price of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents

($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit amended as aforesaid"

and inserting the words,

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or Sep- [fol. 109] tember, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

By striking out the word "and" and inserting the words "that the undersigned"
before the words,

"In all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth"

and by inserting after the words

"Demand for the payment whereof has been duly made, and payment whereof has been refused and declined"

[fol. 110] the words,

"Since the commencement of this action Victor R. Hess has withdrawn from the firm of Lamborn & Company, and William D. Wood has departed this life, and the surviving partners are those named in the notice originally filed herein, other than the said Victor R. Hess and William D. Wood."

before the words,

"The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00)."

This order is entered without prejudice to the rights of the defendants to move to strike out or to take any other proper action they may be advised as to the amended notice of motion as filed.

D. Lawrence Groner, United States District Judge.

In United States District Court

Amended Notice of Motion for Judgment—Filed February 16, 1925

To the National Bank of Commerce of Norfolk, Virginia, a corporation chartered and existing under the laws of the United States of America as a banking corporation, with its principal office and place of business in the city of Norfolk, Virginia:

Take Notice that the undersigned will move the District Court of the United States for the Eastern District of Vir-

ginia, at Norfolk, in its court room in said City on Monday, the 4th day of May, 1925, between the hours of 10:00 a. m. and 2:00 p. m., or as soon thereafter as they can be heard, for a judgment in their favor against you for the sum of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and [fol. 111] five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in said letter set forth, the undersigned having sold and delivered one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22c) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit amended as aforesaid.

That by the words in said letter of credit dated May 11, 1920, "F. O. B. cars Philadelphia, Pa., landed weights, shipments to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa." the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said

goods remained in Lamborn & Company, the undersigned until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression "F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.," meant and intended, and was understood as [fol. 211] meaning and intending, that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa.; and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa., and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa.

That the undersigned in all respects complied with, performed and fulfilled each and all of the obligations conditions and requirements in said letters set forth, upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment hereof has been duly made, and payment whereof has been refused and declined.

That since the commencement of this action Victor R. Hess has withdrawn from the firm of Lamborn & Company, and William D. Wood has departed this life, and the surviving partners are those named in the notice originally filed herein, other than the said Victor R. Hess and William D. Wood.

The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

You are a resident of the State of Virginia, and each of the undersigned is a resident of a State other than the State of Virginia.

Arthur H. Lamborn, a citizen of the United States and a resident of the State of New Jersey; Gerard P. Tameling, a citizen of the United States and a resident of the State of New York; Charles C. Riggs, a citizen of the United States and a resident [fol. 113] of the State of New Jersey; Henry B. Hutchings, a citizen of the United States and a resident of the State of New Jersey; Clarence C. Troup, a citizen of the United States and a resident of the State of Illinois; Karl E. Lindgren, a subject of the King of Sweden and a resident of the State of Pennsylvania; George H. Logan, a subject of the King of Great Britain and a resident of the State of New Jersey; N. Nelson Keen, a citizen of the United States and a resident of the State of New Jersey; B. Wheeler Dyer, a citizen of the United States and a resident of the State of New York, surviving partners of the co-partnership firm of Lamborn & Company, by Baird, White & Lanning, Counsel.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO STRIKE—Filed February 25, 1925

Comes now the defendant above named, by Tazewell Taylor, its counsel, and moves the Court that an order be entered herein requiring the plaintiffs to strike the following portions of the amended notice of motion for judgment herein, for the respective reasons hereinafter mentioned:

1. That portion of said amended notice of motion for judgment reading as follows:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers

to Philadelphia, Pa., the parties—you and the undersigned—herein meant and intended, and you understood [fol. 114] that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co."

for the reason that the terms of the said letter of credit are in writing and fully and completely set out the contract of the parties and cannot be added to, subtracted from, varied or contradicted by any alleged meaning or intention of said parties, nor by contemporaneous parol evidence, and for the further reason that the said language has been passed upon by the United States Circuit Court of Appeals of the Fourth Circuit on writ of error in this cause, and the meaning and intention of such language has been fully interpreted and defined in the opinion of said Court and its order therein entered, in a manner contrary to that alleged as the meaning and intention of the parties in said amended notice of motion for judgment.

2. That portion of said amended notice of motion for judgment reading as follows:

"That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter

to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made [fol. 115] by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon at the time of shipment destined for Philadelphia, Pa."

for the reason that the terms of the said letter of credit are in writing and fully and completely set out the contract of the parties and are in no sense ambiguous and cannot be added to, subtracted from, varied or contradicted by any alleged meaning or intention of said parties, nor by contemporaneous parol evidence, and for the further reason that the said language has been passed upon by the United States Circuit Court of Appeals of the Fourth Circuit on writ of error in this cause, and the meaning and intention of such language has been fully interpreted and defined in the opinion of said Court and its order therein entered, in a manner contrary to that alleged as the meaning and intention of the parties in said amended notice of motion for judgment; for which reason the said plaintiffs cannot rely upon any custom among importers and buyers and sellers of imported sugars so far as said custom is contrary to the general law applicable to this case, which said general law has been declared by the said United States Circuit of Appeals on writ of error in this cause as above alleged; and also for the further reason that said paragraph undertakes to allege that the said words did not mean or require that the vessel or the goods carried therein be at the time of shipment destined for Philadelphia, Pa., which said Circuit Court of Appeals on the writ of error aforesaid had expressly declared to be the meaning and requirement thereof.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION OF DEFENDANT TO STRIKE—June 4, 1925

This day came again the parties and the defendant's mo- [fol. 116] tion to require the plaintiffs to strike out cer-

tain portions of the allegations contained in the amended notice of motion heretofore filed herein having been fully argued, the Court doth sustain said motion, to which action and ruling of the Court the plaintiffs, by counsel, excepted.

D. Lawrence Groner, U. S. District Judge.

Norfolk, Virginia.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT AND JUDGMENT—Filed June 5, 1925

This day came again the parties, by their attorneys, and the issue having been heretofore made up herein, thereupon from the jurors duly drawn and in attendance upon the Court came a jury of twelve, to-wit: E. J. White, J. B. Morgan, W. R. Bassett, J. M. Marshall, L. A. Kee, V. B. Sturtevant, E. P. Huffman, C. C. Foreman, Tapley Portlock, C. W. King, M. J. Eaton, and S. C. Phillips, and who having been as aforesaid duly elected and tried were sworn well and truly to try the issue joined, and at the conclusion of the evidence on behalf of the plaintiffs the defendant, by its counsel, moved the Court to direct a verdict in its favor, which motion the Court doth sustain, to which action of the Court the plaintiffs, by their counsel, excepted. Thereupon the jury, under direction of the Court, returned the following verdict, to-wit: "We, the jury, upon the issue joined, under the direction of the Court, find for the defendant, this 5th day of June, 1925, J. B. Morgan, Foreman." Thereupon the plaintiffs, by their counsel, moved the Court to set aside verdict and grant them a new trial upon the ground that said verdict is contrary to law and the evidence and for misdirection of the jury by the Court, which [fol. 117] motion being fully argued the Court doth overrule, to which action of the Court the plaintiffs duly excepted. Whereupon it is considered by the Court and so ordered that the plaintiffs take nothing by their bill, but for their false clamor in mercy pray, etc., and that the defendant go hereof without day, and recover against the plaintiffs its costs by it about its defense in this behalf ex-

pended. And thereupon the plaintiffs, by their counsel, having intimated an intention to apply for a writ of error of and to the judgment aforesaid, leave is granted them to file their bill of exceptions within eighty-five days from this date.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILLS OF EXCEPTION—Filed August 26, 1925

This day came the plaintiffs, by their attorneys, Baird, White & Lanning, and in pursuance of the leave heretofore granted them, tendered their bills of exceptions, consisting of three certificates of exceptions numbered one, two and three, which were received and considered by the Court, and ordered to be made a part of the record.

D. Lawrence Groner, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Plaintiffs' Certificate of Exceptions No. 1—Filed August 26, 1925

The Court certifies that upon the trial of this cause the plaintiffs offered in evidence the following (a) written papers, documents, correspondence, etc., (b) oral testimony and depositions, put into narrative form, and (c) agreements and stipulations together with the exhibits attached to the testimony and stipulations, and that after the introduction of the aforesaid evidence the defendant moved the Court to direct the jury to return a verdict for the defendant whereupon, after argument, the Court sustained said motion and directed the jury, and it returned a verdict [fol. 118] for the defendant, in the following words and figures, to-wit:

"We, the jury, upon the issue joined, under the direction of the court, find for the defendant this 5th day of June, 1925.

J. B. Morgan, Foreman."

to which action, direction and ruling of the Court, at the time of said action, direction and ruling, the plaintiffs excepted and tendered this their third certificate of exceptions which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the rules and practice of this Court.

And the Court further certifies that the aforementioned: (a) written papers, documents, correspondence, etc. (b) oral testimony and depositions put into narrative form, and the exhibits attached thereto, and (c) agreements and stipulations, are as follows:

[Title omitted]

Before Hon. D. Lawrence Groner, Norfolk, Virginia, June 4, 1925

Present: Messrs. Baird, White & Lanning (Mr. Edward R. Baird, Jr., and Mr. R. Clarence Dozier), and Messrs. H. G. Connor, Jr., Louis O. Van Doren and Alfred C. B. McNevin for the plaintiff; Messrs. Tazewell Taylor and Tazewell Taylor, Jr., for the defendant.

Opinion on Motion to Strike

Mr. Taylor: Your Honor will doubtless recall perhaps that two months ago there was a motion made on behalf of the defendant in this case to strike certain portions of the allegations from the notice of motion. That was argued at [fol. 119] some length before your Honor but no disposition has as yet been formally made of it.

The Court: I think, gentlemen, that I might as well express my views of this matter now because the views that I have are not wholly matters of first impression. The same question which I have just heard argued was submitted by local counsel some two or three weeks ago and the impression that I had at that time and the conclusion that I arrived at has been rather, if anything, strengthened by such reflection as I have been able to give the subject in the interim. The motion is to amend the plaintiffs' pleadings by an additional allegation that the terms of the contract embracing the obligation of the seller are susceptible of construc-

tion different from the construction applied by the Circuit Court of Appeals by reason of a custom and by reason of the existence in the trade of a different meaning than that applied by the Circuit Court of Appeals. I, of course, concede that an amendment to a pleading may be made after a case has gone to the Circuit Court of Appeals and sent back for a new trial, perhaps with the same liberality that it could have been made if offered at the time of the original trial or prior to the original trial and I concede also, of course, that when a case has been sent back for a new trial new evidence may be introduced which may make an entirely different case than the case made on the first appeal. I think perhaps it is allowable to a plaintiff, unless the change proposed creates an entirely new and different cause of action, to amend its pleadings as a matter of law, setting up perhaps additional grounds for recovery, and that that is wholly and entirely permissible after the case has been heard on appeal, but as I understand the rule, it is that when once a question involving the interpretation of a written instrument has been submitted to the court and the court has determined the meaning of the instrument, that determination becomes the law of the case and adheres throughout the entire life of the case.

The Circuit Court of Appeals in this case, in a very elaborate opinion, has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence, to have a case in which the Circuit Court of Appeals had construed [fol. 120] an instrument, a contract of sale, in which they had found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract, and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would

be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, doesn't require the aid of custom to interpret it and would, therefore, have to be overruled and refused admission on that account.

I think if this were an original motion, that is to say, if this pleading had been in the shape in which it now is when it was first filed and this motion had been made to reject on the ground that the court could see by an inspection of the contract attached to the pleadings that it did not require any extraneous facts or circumstances or testimony to determine its meaning, that I should have overruled the motion and reserved the question upon the admissibility of the evidence, but since the avowed purpose of this amendment now and the only purpose is to furnish a foundation upon which evidence may be offered to justify a construction of the contract, the agreement between the parties, so that the agreement may be interpreted to mean what the Circuit Court of Appeals has solemnly declared it does not mean, would, I think, be just a waste of everyone's time.

Whatever my views may be of the right of the case, I am, of course, constrained by the decision of the Circuit Court of Appeals to assent to its conclusion. Its conclusion is that the term "shipment" meant that this sugar should be loaded on a ship in Java, destined for Philadelphia, and that what actually happened in this case is not a compliance with the terms of that agreement. What the amendment seeks to do is to determine by evidence of custom and the [fol. 121] generally accepted trade meaning, that the Circuit Court of Appeals is wrong in its determination of the terms of that agreement, and that what was done in this case was within the terms. To admit evidence of that kind in the face of its decision that the agreement means and only means what they say it means, that there is no ambiguity, no hidden or undetermined meaning, that it is plain, easily susceptible of construction, and as construed means what

they hold it to mean, leaves me, it seems to me, no option but to say that so far as the construction of the paper itself is concerned, that question is determined finally and whether I agree with it or not as an individual, as a court I am obliged to give effect and force to it and hence my conclusion is that the motion to reject should be sustained and when the evidence taken under the amendment and in support of the amendment is offered, I shall be constrained also to sustain the objection to its admissibility.

Mr. Van Doren: Your Honor will allow us an exception to your Honor's ruling.

At 5:15 P. M. court adjourned until 10 o'clock A. M., June 5, 1925.

Norfolk, Virginia, June 5, 1925.

Mr. Van Doren: Will the defendant stipulate that Lamborn & Company is a co-partnership and since that contract Hess has withdrawn and Wood has died?

Mr. Taylor: Yes.

Mr. Van Doren: We ask the defendant to stipulate that the defendant is a national bank.

Mr. Taylor: It is organized under the laws of the United States with its principal office in this city.

The plaintiffs offered in evidence letter of credit dated May 11, 1920, marked Plaintiffs' Exhibit No. 23. This paper was read by Mr. Van Doren and following is a copy thereof:

[fol. 122] PLAINTIFFS' EXHIBIT #23

The National Bank of Commerce

Letter of Credit No. 105

Norfolk, Virginia, May 11, 1920.

Lamborn & Company, 132 Front St., New York:

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by: T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three thousand, One Hundred twenty-three Dollars and eighty-four cents ($53,123.84).

Covering: 1,000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugars at 22 cents per pound, less 2% duty paid f. o. b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in force: January 31, 1921.

This is to be regarded as an irrevocable credit. If im- [fol. 123] possible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly, (Signed) A. E. Wharton, Assistant Cashier."

The plaintiffs offered in evidence a letter from the National Bank of Commerce to the Bankers Trust Company, dated July 15, 1920, and marked Plaintiffs' Exhibit No. 27. This paper was read by Mr. Van Doren, and the following is a copy thereof:

PLAINTIFF'S EXHIBIT #27

THE NATIONAL BANK OF COMMERCE

Foreign Exchange Dept.

Norfolk, Virginia, July 15, 1920.

The Bankers Trust Co., New York City.

GENTLEMEN: We beg to revert to our letter of credit No. 105 dated May 11th in favor of Messrs. Lamborn & Co. for $53,123.84, and to say that we have been authorized by our clients, Messrs. T. S. Southgate & Co. to eliminate the re-

quirement of the copy of ocean bill of lading covering shipment from Java to Philadelphia. All other terms and conditions in the credit to remain as heretofore.

We will be pleased to have you advise Messrs. Lamborn & Co. that this requirement had been eliminated.

Yours very truly, (Signed) A. E. Wharton, Ass't Cashier.'

[fol. 124] The plaintiffs offered in evidence a letter from the National Bank of Commerce to Lamborn & Company, dated July 17, 1920, marked Plaintiffs' Exhibit No. 47. This paper was read by Mr. Van Doren and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT #47

THE NATIONAL BANK OF COMMERCE

Norfolk, Virginia, July 17, 1920.

Messrs. Lamborn & Co., New York City.

GENTLEMEN: Reverting to your letter of July 9th, we would advise that we have requested the Bankers Trust Co. of New York to eliminate requirement in our Credit No. 105 for copy of ocean bill of lading covering shipment from Java to Philadelphia. We have requested the Bankers Trust Co. of New York to notify you of the elimination of this requirement.

Yours very truly, (Signed) A. E. Wharton, Ass't Cashier."

The plaintiffs offered in evidence a letter dated July 16, 1920, from Bankers Trust Company to Lamborn & Company, marked Plaintiffs' Exhibit No. 28. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit #28

The Bankers Trust Company, New York

July 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

[fol. 125] Gentlemen:

Re credit No. 105, dated May 11th, in your favor, issued by National Bank of Commerce, Norfolk, Va.

We refer to your letters of June 10th and 15th on this subject and now advise you that we have received a letter from the National Bank of Commerce, Norfolk, Va., stating that they have been authorized by their clients, T. S. Southgate & Co. to eliminate the requirement of an ocean bill of lading showing shipment from Java to Philadelphia, of which please take note.

All other terms and conditions of this credit are to remain unchanged.

Very truly yours, (Signed) C. F. Born, Asst. Manager."

The plaintiffs offered in evidence contract between Lamborn & Company and Nederlandsche Maatschappy Voor Overzee Handel, marked Plaintiffs' Exhibit No. 44. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit 44

April 9th, 1920.

Buyer: Lamborn & Company, 132 Front Street, New York City.

Seller: Nederlandsche, Maatschappy Voor Overzee Handel, The Hague, Holland.

Contract

Lamborn & Company, have this day bought, Nederlandsche Maatschappy Voor Overzee Handel, have this day sold,

an even quantity of Two Thousand (2,000) short tons of two thousand (2,000) pounds each, of White Java Sugars guaranteed under twenty-five (25) Dutch Standard or [fol. 126] above, for shipment from Java during June and/or July, 1920, at seller's option, at a price of Fifteen Dollars and Twenty-five Cents ($15.25) per hundred pounds, c. i. f. New York.

Lamborn & Company, have this day bought, Nederlandsche Maatschappy Voor Overzee Handel, have this day sold, an even quantity of Five Thousand (5,000) short tons of two thousand (2,000) pounds each, of White Java Sugars guaranteed number twenty-five (25) Dutch Standard or above, for shipment from Java during September, 1920, at a price of Fourteen Dollars and Seventy-five Cents ($14.75) per hundred pounds, c. i. f. New York.

Insurance to be covered free of particular average unless amounting to One Hundred Dollars ($100). War risk also to be covered.

Payment—Buyers will open confirmed irrevocable credit in New York for ninety-five per cent (95%) of the value of the merchandise, when steamers are named, against which credit the Sellers will draw with full sets of documents attached, sixty days sight acceptance draft.

On account of misunderstanding as to whether net certified shipping weights or actual net landed weights are to apply as a basis of final settlement, this matter is left open for settlement after Mr. Baarslag has taken the matter up by cable with his principals, and should it be decided that shipping weights are to apply, the credit is to be for one hundred per cent (100%).

Packing to be as customary, which we understand is in burlap bags of about two hundred and twenty-four (224) pounds each.

C N C F O T No. 2.

Accepted

Lamborn & Co., by B. W. Dyer."

Plaintiffs offered in evidence a document marked Plaintiffs' Exhibit 45, dated April 12, 1920, constituting purchase and sale contract between Lamborn & Company of

[fol. 127] New York and Messrs. C. Czarnikow, Ltd. of London, for the purchase of five thousand long tons, ten per cent more or less of White Java sugar, shipment to be made during August and September, 1920, at seller's option by steamer or steamers to New York or Philadelphia or Boston or Baltimore at buyer's option, port to be declared immediately, another c. i. f. contract.

This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT 45

Contract No. AB-522

New York, April 12th, 1920.

To Messrs. Lamborn & Company, New York:

We have this day sold to you for account of Messrs. C. Czarnikow, Ltd., London, five thousand (5,000) Tons of 2,240 lbs. 10% more or less if complete cargo, otherwise exact quantity, white Java sugars, packed in bags of about two cwt. each. Sound packages only to be delivered.

At ninety-eight (98/-) Shillings cost, freight and insurance to cover particular average (insurance invoice plus 2%) per cwt. of 11 pounds, net landing weights telquel.

Shipment to be made during August/September, 1920, at sellers option by steamer or steamers to New York or Philadelphia or Boston or Baltimore at buyers option, port to be declared immediately.

Payment to be made by three days' sight draft on London. Buyers to open immediately confirmed irrevocable credit in favor of the seller for the full amount of the invoice with an approved London Bank and Bankers to confirm same to sellers in London immediately.

Discharge of 500 tons per weather working day. Demurrage of £450 per day, lay days counting 24 hours from arrival of steamers at or off port.

Delivery of the sugar to be made at a customary safe wharf as directed by the buyer.

Should any unforeseen circumstances such as accidents, [fol. 128] stress of wheater, etc., prevent the steamer or steamers hereafter declared against this contract from clearing within the time specified above, and the seller

or their Agents be unable to supply other tonnage of equal character and capacity, the buyer has the option of cancelling such portion of this contract as has not cleared within the time specified above, or taking the sugar for later shipment, without claiming damages and their decision is to be given immediately on advice from seller that delay has occurred.

Czarnikow-Rionda Co., Brokers. (Signed) E. H. Costello, Secretary & Treaurer."

The plaintiffs offered in evidence a copy of the purchase and sales contract betwen Lamborn & Company and T. S. Southgate & Co., dated April 23, 1920, marked Plaintiffs' Exhibit X. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT X

Plaintiffs' 39 for Ident.—5/8/22. H. C. T.

Contract

Lamborn & Company, 132 Front Street, New York

A B-522

April 23rd, 1920.

To Messrs. T. S. Southgate & Company, Norfolk, Va.:

Quantity

We have this day sold to you for account of ourselves 1,000 Bags (of about 224 lbs. each) Tons (of # # # # lbs. [fol. 129] each) Ten per cent more or less Java White Sugars.

Price

At Twenty-two Cents per pound Less 2%, duty paid. (f. o. b.) cars Philadelphia, Pa.) landed weights.

Shipment

Shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to

Philadelphia, Pa. Names of such steamer or seamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract. In case of damage to the sugars on steamer in transit to Philadelphia, Pa., preventing seller from making full delivery, sellers will deliver under this contract to each of the purchasers of the sugars aboard said steamer a proportionate part of the sound packages.

Payment

Payment to be made by net cash on presentation of Sight draft with invoice, and bill of lading attached in New York. Buyers to open within five (5) days confirmed irrevocable letter of credit in favor of Lamborn & Company, New York City, for the full invoice value of 1,100 bags with Bankers Trust Company, New York City and Bankers to confirm same to Lamborn & Company, New York City.

Should any unforeseen circumstances, such as embargoes, government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc., prevent shipment within the time specified above, the buyer has the option of cancelling such portion of this contract affected by such delay or taking the sugar so affected for later shipment, without claiming damages, and buyers decision is to be given immediately on advice from sellers that delay has occurred.

In the event of such cancellation by buyer, the sellers [fol. 130] shall be under no further obligation to the buyer under this contract.

Lamborn & Co. C. A. G."

Accepted. Entered. T. S. Southgate & Co. D. M. Thornton.

STATEMENT RE PLAINTIFFS' EXHIBITS 1 TO 7

The plaintiffs offered in evidence seven bills of lading covering approximately forty thousand bags in the aggre-

gate of Java white sugar on board the Japanese steamship "Chifuku Maru" at the port of Surabaya, Island of Java, bearing date September 15, September 28th and September 24th, marked Plaintiffs' Exhibits 1 to 7, inclusive.

Mr. Taylor: I object to such of these exhibits as are tendered as they show an alteration therein, erasing the word- "New York" and substituting the word "Philadelphia" which seems to be in a different handwriting and different ink.

The Court: I will allow them to come in with the understanding that you will not only show they are original bills from which the cargo was delivered and customs paid but you will account for the apparent change if there is one, in the bill.

These papers consisted of seven on board ocean bills of lading of the S. S. "Chifuku Maru," covering in the aggregate 40,259 bags of sugar, all dated Surabaya, Java, on the 15th, 24th, and 28th of September, 1920, respectively, and purporting to cover transportation from Cheribou to Philadelphia, and from Samarang to Philadelphia, respectively, consigned to order notify Lamborn & Company, all endorsed by the shipper in blank.

(NOTE.—Plaintiffs' Exhibits Nos. 1 to 7 are not printed in full, the parts omitted not being deemed material by the parties.)

[fol. 131] Plaintiffs offered in evidence the original bill of lading of the steamship "West Cheswald," marked Plaintiffs' Exhibit No. 8.

STATEMENT RE PLAINTIFFS' EXHIBIT 8

This was an on-board order ocean bill-of-lading dated Samarang, September 30th, 1920, covering 34,666 bags of sugar of a gross weight of 56,852.24 piculs, marked N. M. V. O. New York, made in Java. It read in part:

"Received on board S. S. West Cheswald, * * * to be transported via port or ports, within or without the ordinary course of the voyage, and in any order or rotation, as

hereinafter provided in Article 1 hereof, to the port of destination or discharge, or so near thereto as the vessel may safely get, always afloat at all stages of the tide, on payment of the freight and charges thereon, in United States currency, or New York exchange, unless otherwise specified herein, without any deduction, whatsoever. The name of the consignor or shipper, consignee and vessel, respectively, and the destination and particulars as to the merchandise, to be shipped hereunder, as given by the consignor or shipper, the port of destination, freight, primage and other charges, payable thereon, are stated on the reverse side of this bill-of-lading, and are a part of the contract of carriage."

"1. The carrier may for any reason, substitute any other vessel or vessels or any space therein for the one named herein, either before or after receipt or shipment of goods whether at port of shipment or at any other port or place, and/or may transport the whole, or any portion, of the goods by any other vessel or vessels, at the original port of shipment, or at any other port or place. The carrier shall have the further right to convey the goods in and by craft, lighters, carts or other conveyances to and from the vessel or vessels, at the risk of the goods. The vessel, with the goods on board, either before or after proceeding toward the port of discharge, may proceed by any route, and, at any stage of the voyage, may deviate from, or change the intended route, and may proceed to, or toward, call, enter or stay at, any port or place whatsoever, although in a contrary direction to, or outside of, or beyond, the usual route [fol. 132] to the said port of discharge, once or oftener, in any order or rotation, backwards or forwards, for any purpose whatsoever, that, in the opinion of the carrier, may seem advisable, desirable, or convenient, and may also adjust compasses, dock or dry-dock, go on ways, with or without cargo on board, before or after commencing the voyage, and may sail, and/or enter, any port or place with or without pilots, may tow and assist vessels in all situations, and the doing of anything, hereinabove mentioned, shall not be deemed a deviation, but shall be deemed included within the intended voyage, as fully as if specifically provided for herein, this liberty not to be considered

as restricted by any words of this bill-of-lading whether written, printed or stamped herein or hereon."

On the reverse side the bill-of-lading read in part:

"Steamship West Cheswald, port of discharge, New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York."

It was signed by the United States Shipping Board Emergency Fleet Corporation, Francis Peek & Co., Ltd., by du Cloux, and was endorsed by "Ned. My. Voor Overzee Handel" in blank.

So much of the further provisions of this bill-of-lading as are deemed material by the parties are as follows:

"Should the steamer be detained by authorities of any country and be required to discharge at or return to any port all or some of the goods, the master at his option is authorized either to so discharge such goods or—after reaching a subsequent port or the port of destination—to forward the goods to such ports as the said authorities may require, to store the goods there and/or deal with them in such manner as the said authorities may direct, at the risk and expense of the owners of the goods. The port where the goods are so discharged or to which they are so forwarded shall then be deemed to be the port of destination, the ship having a lien on such goods for the freight as per [fol. 133] B/L and for all expenses incurred, including the forwarding freight from the port of transshipment."

NOTE.—Plaintiffs' Exhibit 8 is not printed in full, the parts omitted not being deemed material by the parties.

The plaintiffs offered the deposition of GIICHI ISHIDO, taken in New York City on February 10th, 1922, which in narrative form is as follows:

I reside at 500 West 140th Street, New York City. I am over twenty-seven years of age and am a clerk in the employ of Suzuki & Company, 220 Broadway, New York City; they are importers and exporters and are the agents for the Japanese steamship line called the Teikoku Kisen

Kabushiki Kaisha. I have been with Suzuki & Company for about four years.

I know the gentleman called M. Kamimura; I knew him in 1920 in Java, where I was from August to November 11th, 1920. I met Mr. M. Kamimura at Surabaya. He was the manager of Suzuki & Company at Surabaya and in charge of sugar shipments for Suzuki & Company. I arrived at Surabaya on August 10th and stayed there until November 11th. During that period of three months I was continuously in Surabaya. I saw Mr. Kamimura frequently during that period, and came to know him quite well. I was a clerk in Suzuki & Company's office in Surabaya, handling sugar shipments, and Mr. Kamimura was my superior; I was working in Mr. Kamimura's office.

I know the signature of Mr. M. Kamimura quite well. The seven papers which are shown me I saw at Surabaya and know them very well. I have seen papers like them before; they are in the form used by Suzuki & Company as agents for the Teikoku Kisen Kabushiki Kaisha.

While I was a clerk in the office of Suzuki & Company at Surabaya, Java, between August 10th and November 11th, 1920, these seven papers shown me came into my hands and under my observation. I examined them before I delivered them.

I recall the steamship Chifuku Maru during my clerkship at Surabaya under Mr. Kamimura. I do not know [fol. 134] what line she belonged to but she was a steamer of which Suzuki & Company were the agents.

I recognize the signature of M. Kamimura on each of these seven papers shown me; they bear the genuine signature of Mr. M. Kamimura. (These papers marked Plaintiffs' Exhibits 1 to 7, inclusive, for identification.)

The substitution of the word "Philadelphia" for "New York" on exhibits numbers 3, 4 and 5 was made by myself in my own handwriting. The words "as arranged" in ink upon Plaintiffs' Exhibits 1, 3, 4 and 5 were upon those documents before they came to me. The words "as arranged" in typewriting upon Plaintiffs' Exhibits 2, 6 and 7 were on those papers before they came into my hands.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6 and 7 are genuine bills of lading issued by Suzuki & Company at Surabaya for the steamship Chifuku Maru.

These documents, Plaintiffs' Exhibits 1 to 7, inclusive, were delivered by Suzuki & Company on the dates they bear. The date on Plaintiffs' Exhibit 6 is very faint and difficult to read, but I have Suzuki & Company's office copy of the same paper which came from Surabaya to Suzuki & Company in New York. Refreshing my recollection from that paper, I state that the date of Plaintiffs' Exhibit 6 for identification is September 24, 1920.

The documents were dated the day the loading of the cargo was finished. I don't remember exactly when they were delivered but it was probably within ten days or two weeks.

The signature to the endorsement on Plaintiffs' Exhibits 1 to 7, inclusive, under the typewritten words "per pro Suzuki & Company" is that of M. Kamimura; they are his genuine signature.

The plaintiffs offered the deposition of JINOSUKE MINAMI, taken in New York City on February 10th, 1922, which in narrative form is as follows:

I live at 135 Kelvin Street, Forest Hills, Long Island. I am thirty-five years old and am New York representative for Suzuki & Company. I am manager of Suzuki & [fol. 135] Company's New York office. I am the head man in the New York office.

Suzuki & Company are agents for the Teikoku Kisen Kabushiki Kaisha.

Suzuki & Company is a partnership.

I know Mr. M. Kamimura personally. His first name is Masakichi. I have known him for four or five years. He is employed by Suzuki & Company but I don't know in what place. He was employed by Suzuki & Company in September, 1920, in Surabaya, I am informed.

I have heard of the steamship Chifuku Maru; Suzuki & Company were the agents for that ship; the Chifuku Maru was a ship of the line called Teikoku Kisen Kabushiki Kaisha.

I know the signature of Mr. M. Kamimura. I know his signature in the Japanese form but the signatures on the bills of lading Plaintiffs' Exhibits 1 to 7 are written in English script.

The plaintiffs offered the deposition of S. Alting Du Cloux, taken at Samarang, Java, on written interrogatories which was as follows:

"My name is G. Alting du Cloux. I am forty-two years of age and reside in Batavia, at Museumlaan 12. I am a partner of the firm of J. C. Van Rossen and Company, steamship agents in Batavia, Samarang and Surabaya.

Shortly prior to and subsequent to September 30th 1920, my place of residence was Batavia. I was employed by Francis Peek & Company, Limited, as manager of the shipping department. I remember that in September, 1920, the steamship "West Chestwald" was loaded by the Nederlandsch Maatschappy Voor Overzee Handel, who were the shippers of certain sugar. I do not know who the consignee of the sugar was. The signature on the photostatic copy of an ocean bill of lading of the steamship "West Cheswald," dated at Samarang, Java, September 30th, 1920, is my own. I signed that bill of lading on September 30th, 1920, at the instance of the shippers, on the authority that I had from Francis Peek & Company, Limited, to sign the bill of lading as manager of the shipping department. It was signed on behalf of Frances Peek & Company, Limited, and I signed it in the name of [fol. 136] Francis Peek and Company, Limited, as agents for the United States Shipping Board, Emergency Fleet Corporation, United American Lines, Incorporated, successors to Independent Steamship Corporation, Agent.

I handed the original bill of lading over to the shippers against payment of freights and against letter of guarantee of the shippers according to which they promised to deliver to the steamship agents the mate's receipts signed by the captain of the steamship "West Cheswald" as soon as those mate's receipts came to hand to them from Samarang. The captain signed the mate's receipts in Samarang as soon at the cargo was taken over. Those mate's receipts were handed to the shipper to send them to Batavia and deliver them to the steamship agents here in exchange for the bill of lading and the letter of guarantee.

The mate's receipts are receipts signed by the captain declaring having received on board the cargo mentioned therein.

During the time the "West Cheswald" was loading sugar in Java it happened that steamers arrived after the

date specified in the contract of purchase between the shippers and consignees, that is such steamers were to be loaded before a certain date. Bills of lading were given by the steamship agents, bearing a date of shipment falling within the shipping period stated in the contract of purchase. On account of a heavy fall in prices of sugar during the month of September, 1920, the purchasers endeavored wherever possible to cancel contracts and for that purpose investigated carefully the dates of departure of the steamers, but in the sase of the "West Cheswald" the loading actually began, I believe, on the 28th of September, 1920. It is so long ago that I cannot remember the date exactly but the fact is loading was begun in time so that by greatest effort and by loading at night, the loading of cargo in question was completed on September 30th, 1920."

STATEMENT RE PLAINTIFFS' EXHIBIT 235

The plaintiffs offered in evidence a paper marked Plaintiffs' Exhibit 235. This was an on-board ocean bill-of-lading of the S. S. Washington Maru dated September 28th, 1920, covering 10,043 bags of sugar and covering transportation from Surabaya to Philadelphia, the goods being consigned to order notify Lamborn & Company, New [fol. 137] York, and the bill-of-lading being endorsed by the shipper to the American Foreign Banking Corporation and by the American Foreign Banking Corporation to Lamborn & Company.

(NOTE.—This Exhibit 235 is not printed in full, the parts omitted not being deemed material by the parties.)

The plaintiffs offered in evidence a letter from Lamborn & Company to T. S. Southgate & Company dated August 30, 1920, marked Plaintiffs' Exhibit 49. This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT 49

August 30, 1920.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We hereby declare that the steamships "Chifuku Maru" and "Washington Maru" or substitutes will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920.

Very truly yours, Lamborn & Company.

CG:VR."

The plaintiffs offered in evidence letter from Lamborn & Company to T. S. Southgate & Company dated September 29th, 1920, marked Plaintiffs' Exhibit #50. This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT #50

Refined Sugar Dept. CAG:IW

9/29/20.

T. S. Southgate & Co., Norfolk, Va.

[fol. 138] GENTLEMEN: We have received advices that the S/S 'Chifuku Maru' carrying your Javas purchased under contract dated April 23rd, 1920, sailed from Java on Aug. 22nd, and is due to arrive the latter part of Oct.

Very truly yours, Lamborn & Company."

The plaintiffs offered in evidence paper marked Plaintiffs' Exhibit 51, being a letter from Lamborn & Company to T. S. Southgate & Company, dated November 10, 1920. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit 51

Refined Sugar Dept. CAG:IW

Nov. 10th, 1920.

T. S. Southgate & Co., Norfolk, Va.

Gentlemen: On September 29th we notified you that the steamer 'Chifuku Maru' was due to arrive the latter part of October.

We are now in receipt of advices to the effect that this steamer is not expected to arrive before the last half of November.

Yours very truly, Lamborn & Company."

The plaintiffs offered in evidence a letter from Lamborn & Company to T. S. Southgate & Company, dated December 13, 1920, marked Plaintiffs' Exhibit No. 52. This paper was read by Mr. Van Doren, and the following is a copy thereof:

[fol. 139] "Plaintiffs' Exhibit 52

December 13, 1920.

Messrs. T. S. Southgate & Company, Norfolk, Virginia:

Dear Sirs:

Contract April 23, 1920, 1,000 Bags, 10% More or Less

On November 10, 1920, we advised you that the Steamer 'Chifuku Maru', previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of November, 1920, had been unavoidably delayed, owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer 'West Cheswald', carrying the same quality of sugar, and having made the same

shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Very truly yours, Lamborn & Company."

N. Nelson Keen, being first duly sworn, testified on behalf of the plaintiffs as follows:

Examined by Mr. Van Doren:

I reside at Upper Montclair, New Jersey. I was at the time of the occurrence of the circumstances and facts of the transactions upon which this litigation is based, a member of the firm of Lamborn & Company. I subsequently retired from that partnership, about April 1st, 1923, subsequent to the commencement of this action. While I was a member of the firm, I had to do with these shipments of Java white sugar. I was in charge of the financial de- [fol. 140] partment of our business and had supervision of the letters of credit and contracts came to my attention. The contracts as made both abroad and here, that is for the sugars in bulk and the cargoes and for their disposition or resale here came into my hands, and likewise the letters of credit or other terms of payment under those contracts were peculiarly within my province.

I know about the letter of credit which was posted by the defendant here. I am familiar with all of the circumstances and transactions in this matter. I was a witness on the former trial. The facts concerning the delay or accident of the "Chifuku Maru" came to my knowledge at or about the time thereof.

The plaintiffs offered in evidence a letter from Czarnikow-Rionda Company dated October 8, 1920, to Messrs. Lamborn & Company, marked Exhibit No. 201. This paper was read by Mr. Van Doren, and following is a copy thereof:

"Plaintiffs' Exhibit 201

Czarnikow-Rionda Company

New York, October 8, 1920.

Messrs. Lamborn & Company, New York.

Dear Sirs:

Contract AB-522—April 12th

Kindly note our London representatives cable us today that 40,259 bags against the above contract have been shipped per s/s 'Chifuku Maru'—which advice amends our letter to your of August 14th.

This information is passed on to you under usual reserve for telegraphic errors and subject to substitution.

Yours truly, Czarikow-Rionda Company. C. H. A. Mott, Vice-President."

[fol. 141] These papers marked Plaintiffs' Exhibits 48, 53, 54, 55, 202, 203, 204, 205 and 56, came to my knowledge and attention at or about the time that they bear date, in the usual course of my business, as I have described my business at that time.

The plaintiffs offered in evidence documents marked Plaintiffs' Exhibits 48, 53, 54, 55, 202, 203, 205, and 56. They were read by Mr. Van Doren. Plaintiffs' Exhibit No. 48 was a notice from the New York Maritime Register of the issue of November 17, 1920, as follows:

Plaintiff's Exhibit 48

"Chifuku Maru (Jap s s)—London, November 15.

A telegram from Port Said states that steamer Chifuku Maru, from Colombo, etc., for Philadelphia, has arrived there with high pressure cylinder and piston damaged; repairs will require about seven days."

PLAINTIFFS' EXHIBIT No. 53

"November 17th, 1920.

United American Lines, Inc., 39 Broadway, New York City.

Mr. Gilbride

GENTLEMEN: We have been requested by our clients, Messrs. Lamborn & Company, to determine the delay and sailing date of the S. S. 'Chifuku Maru,' bound from Colombo to Philadelphia, which is reported now in Port Said with machinery damaged. We will appreciate your sending the enclosed cable requesting this information for our account.

Kindly inform us of any expense in connection with sending same and we will forward remittance promptly.

Thanking you for this courtesy, we are,

Yours very truly, Comet Forwarding Corporation,
by —— —— President,"

PCC/MM.

[fol. 142] PLAINTIFFS' EXHIBIT No. 54

"#13 Chifuku Maru Colombo for Philadelphia Understand Port Said Machinery damaged determine delay and sailing date also if any damage cargo."

PLAINTIFFS' EXHIBIT No. 55

"United American Lines

New York, Nov. 24, 1920.

Comet Forwarding Co., 132 Front Street, New York City.

DEAR SIRS: We received the following cable from our agents, Messrs. Worms & Co., at Port Said,

Fifth Captain Chifukumaru thinks no damage to cargo expects sail about Fourth December Worms.

Cable it attached.

Bill for charges for both cables will be forwarded to you through our accounting department.

Very truly yours, United American Lines, J. J. Geuride, Ass't Freight Traffic Manager."

J. J. G./C.

PLAINTIFFS' EXHIBIT No. 202

[fol. 143] Nov. 23, 1920.

JK X217 Low Portsaid 16.
Unamline NY.

Fifth Captain Chifukumaru thinks no damage to cargo expects sail about fourth December.

Worms."

PLAINTIFFS' EXHIBIT No. 203

"December 6th 1920.

United American Lines, 39 Broadway, New York City.

Mr. Gilbride

GENTLEMEN: In accordance with telephone conversation, kindly cable your agents in Port Said as follows:

'Cable date Chifuku Maru sailed if still in port cable date clearance.'

Thanking you for this favor, we remain,

Yours very truly, Comet Forwarding Corporation, by —— ——, President."

PCC/MM.

PLAINTIFFS' EXHIBIT No. 204

"#1 cable date Chifuku Maru sailed stop if still in port cable date clearance."

[fol. 144] PLAINTIFFS' EXHIBIT No. 205

"United American Lines, New York

Dec. 11, 1920.

Comet Forwarding Co., 132 Front Street, New York City.

Attention of Mr. Cornelius

DEAR SIRS: Supplementing our letter of Dec. 7th, attaching copy of cable sent to Hull Blythe & Co. in your behalf inquiring of the Chifuku Maru, we are attaching copy of reply for your information.

Very truly years, United American Lines, Inc. J. J Guerdie, Ass't Freight Traffic Manager."

——G/C.

PLAINTIFFS' EXHIBIT No. 56

"Chifuku: Chifuku.
Efangutix: Delay owing to strike.
Padohrolcy: Repair shop.
Vyhyouhhym: We will telegraph immediately.
Pragdojtyp: Steamer sails probably—
Vynugvapor: Next week

Hull Blythe & Co."

The cargo of the "West Cheswald" under the bill of lading which has been offered in evidence, we received in good order and condition. The "Chifuku Maru" ultimately arrived February 4, 1921, at Philadelphia. Lamborn & Company received the cargo consigned to them under those [fol. 145] bills of lading, in good order and condition. The "Washington Maru" arrived on or about December 19, 1920, at Philadelphia. The "Chifuku Maru" arrived at Philadelphia; likewise the "West Cheswald." We received and obtained from the steamship "Washington Maru" the bags of Java white sugar covered by the bill of lading which has been offered in evidence of that ship, in good order and condition. The "West Cheswald" arrived on or about December 16, 1920, at Philadelphia;

the "Washington Maru" on or about December 19, 1920; and the Chifuku Maru" on February 4, 1921; so that the "West Cheswald" and the "Washington Maru" arrived within three days of each other. They both reported at the same time, and carried this same Java white sugar.

These documents shown me, which are marked 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216 and 217, came into my hands and to my knowledge and attention at or about the time that they bear date.

These documents were offered in evidence by the plaintiffs, and were read by Mr. Van Doren. The following are copies thereof:

"PLAINTIFFS' EXHIBIT #206

Tracy Steamship Company, New York, U. S. A.

Dec. 2nd, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York, N. Y.

(Att'n Mr. Dyer)

GENTLEMEN:

S/S. West Cheswald

We beg to refer to telephonic conversation of yesterday with our Mr. Weston with reference to diversion of the above vessel to Philadelphia.

[fol. 146] In order that we may have your request in writing, will you kindly confirm by letter your desires in this respect also setting forth amount of cargo on board the West Cheswald for your account.

Yours very truly, Tracy Steamship Company, Inc. L. Morton Jensen. (Signed L. Morton Jensen), Marine Superintendent."

"PLAINTIFFS' EXHIBIT #207

December 3rd, 1920.

Tracy Steamship Company, 17 Battery Place, New York City.

GENTLEMEN:

Attention of Mr. L. M. Jensen

Replying to your favor of December 2nd, regarding the 'West Cheswald', we wish to inform you that we have about 3,572 tons of white Java sugars on this boat.

As one of the writers' assistants explained over the telephone, we may find it necessary to discharge the 'West Cheswald' at Philadephia, and we would very much appreciate it if you would take this matter up with the Shipping Board immediately and find out, if it does become necessary for us to do this, how the matter can be arranged.

We would very much appreciate it if you would expedite this matter.

Yours very truly, Lamborn & Company, by ——.''

BDD/RCS.

[fol. 147] "PLAINTIFFS' EXHIBIT #208

New York, N. Y., December 11, 1920.

Master Steamer West Cheswald:

(From Ponta Delgada Dec. 3rd for New York) Radio immediately amount general and sugar aboard how stowed and if sugar Lamborn can be discharged without moving other cargo.

Tracio.

12:30 p. m.
J/CW.
Charge M. H. Tracy & Co., Inc.
W. U. radio.''

"Plaintiffs' Exhibit #209

1920, Dec. 11, P. M. 5:35.

NS SV WX 2 57 Radio SS Westcheswald 3 am Dec. 9th via Bermuda and Barrington Passagens Dec 11.

Govt Cacio NYK.

Twenty seven hundred tons general cargo numbers one two four five hatches including eleven hundred tons sugar marked S Z K optional Delaware breakwater for which has no manifest bills lading neither for cargo loaded at Surabaya Lamborn sugar available without moving other cargo and must be discharged first ship due about Dec. 14th am. Master."

"Plaintiffs' Exhibit #210

Lamborn & Co., New York

December 13th, 1920.

[fol. 148] Tracy Steamship Company, 17 State Street, New York City.

Gentlemen: Confirming telephone conversation of this afternoon Mr. Gawel, in reference to our conversation with Mr. Sinclair of the Shipping Board, we herewith authorize you to divert the S/S 'West Cheswald' to Philadelphia, and advise you that on account of such diversion, we agree to pay One Dollar ($1.00) per ton, bill of lading weight, excess freight on the quantity of about thirty-five hundred and seventy-two tons (3572) of Java white sugars which are coming to us on this boat.

This letter is written in duplicate and your acceptance of the attached copy constitutes our agreement.

Thanking you for your cooperation in this matter, we beg to remain,

Yours very truly, Lamborn & Company. B. W. Dyer."

BWD/RCS.

"Plaintiffs' Exhibit #211

M. H. Tracy & Co., Inc.

Radio

Date: Dec. 13, 1920.

Master Steamer West Cheswald (from Ponta Delgada, Dec. 3rd, for New York):

Proceed Philadelphia reporting Megee acknowledge.

Tracio."

[fol. 149] "Plaintiffs' Exhibit #212

2PTBW 10GOVT RADIO.
SS Westcheswald Via Pt Newyork Dec. 14 20.
Govtsb Tracio, Newyork:
Westcheswald proceeding philadelphia as per instructions.

Master. 155A."

"Plaintiffs' Exhibit #213

Tracy Steamship Company, New York

December 14, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

Gentlemen:

SS. West Cheswald

Replying to your favor of 13th instant which is hereby acknowledged, concerning the diversion of the above steamer to Philadelphia for discharge of your sugar.

We have succeeded in reaching the vessel by radio and she is now proceeding on her way to Philadelphia.

Yours very truly, Tracy Steamship Company Inc.,
per (Signed) Francis C. Gawel.

FCG/WMK

[fol. 150] Certified true copy.
Tracy Steamship Company, Inc., per (Signed) Francis C. Gawel. Francis C. Gawel."

"PLAINTIFFS' EXHIBIT #214

H 39 P 9Govt Radio.
SS Westcheswald via U. S. Philadelphia, Penn., 15:
Govt. SB. Tracto, New York:
Westcheswald arrived Delaware Breakwater Midnight.
Master."

"PLAINTIFFS' EXHIBIT #215

Tracy Steamship Company, New York

December 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

GENTLEMEN:

Attention Mr. Dyer. S/S 'West Cheswald'

We enclose herewith our invoice covering extra freight due the above steamer on account of diversion from New York to Philadelphia.
[fol. 151] Will you kindly let us have your check to cover, and much oblige,
Yours very truly, Tracy Steamship Company, Inc., Per Francis C. Gawel. Francis C. Gawel."

FCG/MMK.

"PLAINTIFFS' EXHIBIT #216

Dec. 16, 1920.

Messrs. Lamborn & Co., 132 Front St., New York City.

To Tracy Steamship Company, Inc., Dr.

SS. West Cheswald No. 1

Extra freight due on account diverting above steamer from New York to Philadelphia as per your letter of agreement dated December 13th, 1920, 3,572 tons sugar (Java) at $1.00 per ton. $3,572.00

Adjustable on Bill of Lading weight."

"Voucher No. 21977. New York December 16th, '20. No. 3636.

Lamborn & Co.:

Pay to the order of Tracy Steamship Company $3,572.00, three thousand five hundred seventy-two and 00/100 dollars.

Irving Nation Bank.

1-67. New York. Duplicate.

Memorandum of settlement.

Please detach before presenting.

[fol. 152] Description: ——. Distribution: ——.

Invoice Dec. 16th for freight SS. West Cheswald 3572.00"

"PLAINTIFFS' EXHIBIT #217

United States Shipping Board Emergency Fleet Corporation

New York, December Fourteenth, 1920.

M. H. Tracy & Company, 17 State Street, New York City.

Att. Mr. Gawel, West Cheswald

GENTLEMEN: This will confirm authority given you by telephone last evening to divert the SS West Cheswald to Philadelphia, in order to discharge a consignment of sugar

for Lamborn & Company, which we understand amounts to approximately 3,572 tons. You will assess Lamborn & Company $1.00 per ton additional on this consignment to compensate as for the diversion of this vessel.

We confirm your advice to us that this arrangement is acceptable to Lamborn and Company.

Yours very truly, J. F. Andrews, Mgr. Traffic Department, by J. Sinclair. (Signed) J. Sinclair, Tr. Supervisor (Acting) Far East & African Trades."

JS/MS.

After the arrival at Philadelphia of the steamship "West Cheswald" shipping documents and drafts were prepared for delivery to the Bankers Trust Company under the letter of credit No. 105 of the defendant in this case. The documents shown me marked Plaintiffs' Exhibits 18, 19, 20-A, 21, and 16-A were prepared under my instructions with my knowledge and direction. The endorsement on the [fol.153] back of the railroad bill of lading, Exhibit 16-A, is that of Leonard Elsmith, my assistant, and was done under my authority and direction.

The plaintiffs offered these documents in evidence.

The following are copies of Exhibits 18, 19, 20, 20-A and 21 which were read by Mr. Van Doren:

"Plaintiffs' Exhibit #18

Lamborn & Company

DS 2855

$48,009.81. New York, December 20, 1920.

At sight Pay to the order of ourselves Forty Eight Thousand and Nine Dollars—81/100 Dollars with exchange, Value received, and charge the same to account of T. S. Southgate & Co., Norfolk, Va.

6/11/20. Natl. Bank of Commerce, Norfolk, Va.

To Bankers Trust Co., New York City.

L/C-105 5/11/20.

Lamborn & Co."

"Plaintiffs' Exhibit #19

New York, December 17th, 1920.

Return of 1,000 bags sugar weighed for Mess. T. S. Southgate Co., Norfolk, Va., by order of Mess. Lamborn & Co., Ex S. S. "West Cheswald."

Car CRI&P	40979	335	Bags wg.	75420	lbs. gross
MSPSM	36470	335	" "	75620	" "
TNO	31041	330	" "	74240	" "
		1,000	Bags wg.	225280	lbs. gross
				2600	lbs. tare
				222680	lbs. net

Geo. J. Hoffman & Co."

[fol. 154] "Plaintiffs' Exhibit #20

Lamborn & Company, New York

Lot No. P. C. 22.
SS West Cheswald.
Invoice #DS-8622. December 20, 1920.
Sold to T. S. Southgate & Co., Norfolk, Va.
Bankers Trust Co., 6/11/20.
MK. Terms Natl. Bank of Commerce, Norfolk, Va.

L/C-105-5/11/20

1,000 Bags of Java White Sugar

1,000 Bags of Java white sugar, net weight 222,680 lbs. at 22c per lb. duty paid F. O. B. cars Philadelphia, Pa., landed weights....	$48,989.60	
Less 2%	979.79	
		$48,009.81

C R I & P—40979 335 bags.
Soo Line 36470 335 "
T & N O 31041 330 "

E. & O. E.

SD-2855

(Certified weight sheet attached.)"

PLAINTIFFS' EXHIBIT #20-A

Lamborn & Company, New York

Lot No. P. C. 22.
[fol. 155] Order No. SS. West Cheswald.
Invoice No. DS-8622. December 20, 1920.
Sold to T. S. Southgate & Co., Norfolk, Va.

Bankers Trust Co. 6/11/20

MK. Terms Natl. Bank of Commerce, Norfolk, Va.

L/C-105-5/11/20

1,000 Bags of Java White Sugar

1,000 Bags of Java White Sugar, Net Weight 222,680 lbs. at 22c per lb. Duty Paid F. O. B. Cars Philadelphia, Pa., Landed Weights	$48,989.60	
Less 2%	979.79	
		$48,009.81

C R I & P—40970 335 Bags.
Soo Line 36470 335 "
T & N O 31041 330 " E. & O. E.

SD-2855.
(Certified weight sheet attached.)"

"PLAINTIFFS' EXHIBIT #21

December 23rd, 1920.

To whom it may concern:

This is to certify that the 1,000 bags of Java White Sugar invoiced by us on our DS#-8622 to T. S. Southgate & Co., Norfolk, Va., were unloaded from the S/S 'West Cheswald,' and ocean bills of lading are on file

[fol. 156] in our office dated Samarang, Java, Sept. 30, 1920.
Yours very truly, Lamborn & Company, (Signed)
N. Nelson Keen, Member of Firm.

PJB/FB.

Sworn to before me this 23rd day of Dec. 1920.
Joseph N. Lo Medico."

That is my signature on Plaintiffs' Exhibit No. 21.

Plaintiffs' Exhibits 16 and 16-A were respectively a photographic copy and the original of an order railroad bill of lading of the Pennsylvania Railroad Company dated Philadelphia, Pa., December 17, 1920, covering 1,000 bags of Java Sugar loaded 335 bags on car No. CRI & P 40979, 335 bags on car No. SOO L 36470 and 330 bags on car No. T. & N. O. 31041, consigned to the order of Lamborn & Company, destination Norfolk, Virginia, notify T. S. Southgate & Company, Norfolk, Virginia. They bore on their face the following notations:

"Shippers No. West Cheswald"

"Lamborn & Company shippers Per W. H. L."

"Received at Wash. Ave. Wharf, Philadelphia, Pa. Dec. 17, 1920, Penna. R. R., M. J. Considine, Agent, per Hayes."

On the reverse they bore the endorsement:

"Lamborn & Co. by Leonard Elsmith."

(No other portion of these exhibits is printed as the parts omitted are not deemed material by the parties.)

It was stipulated that the photographic copy marked Plaintiffs' Exhibit No. 16 might be used in place of the [fol. 157] original Plaintiffs' Exhibit 16-A, and that the original might be handed back to the railroad company by whom it was produced upon the trial.

The plaintiffs offered in evidence a letter, dated December 23, 1920, from Lamborn & Company to Bankers Trust Company, marked Plaintiffs' Exhibit 17-A. This exhibit

was read by Mr. Van Doren, and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT #17-A

Lamborn & Co., New York

December 23rd, 1920.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: We herewith beg to hand you shipping documents covering 1,000 bags of Java white sugar, amounting to $48,909.81, to apply against your Letter of Credit dated 6/12/20, opened in our favor for account of T. S. Southgate & Company, Norfolk, Va.

The injunction granted, copy of which was served upon you, authorizes us to deliver documents to your good selves, and you to retain same subject to further order of the court upon this injunction, which at present only prevents Lamborn & Company from accepting payment for the above shipment.

Yours very truly, Lamborn & Company. (Signed) N. Nelson Keen, Member of Firm.

JB:FB."

Subsequent to the date of that letter, I went to the Bankers Trust Company to see Mr. Kent, who was Vice-President of the Bankers Trust Company, concerning the refusal to pay on the part of the National Bank of Com-[fol. 158] merce. It was after the injunction had been vacated. He communicated with the National Bank of Commerce; some of the communications which were sent were shown to me.

Mr. Van Doren: I will hand you the communications and you can pick out those that were shown to you. Please pick out of those documents the documents which were shown to you by the Bankers Trust Company officials in the course of your communications and conversations with them. Lay them to one side or gather them in a separate package.

A. These three, to the best of my recollection, were shown to me; this one dated December 27, 1920, from the National Bank of Commerce to the Bankers Trust Company—I saw that in the hands of one of the men connected with the Bankers Trust Company and was not allowed to read the telegram.

Q. You did not read that?

A. No, I saw that.

Q. Keep the three that you did see and please continue with the statement or recital of your communications with the Bankers Trust Company, so far as you had any and all communications with them in regard to the payment or non-payment of this draft.

A. On or about December 27, 1920, the Bankers Trust Company sent the telegram which I hold here to the National Bank of Commerce at Norfolk.

(Witness read plaintiffs' Exhibit #35 as follows:)

PLAINTIFFS' EXHIBIT 35

December 27, 1920.

National Bank of Commerce, Norfolk, Va.:

Lamborn has presented draft and documents covering one thousand bags sugar under your credit one hundred five account Southgate documents apparently in order have you arranged examine documents please wire.

Bankers Trust Company."

[fol. 159] Mr. Van Doren: We offer that document in evidence marked Plaintiffs' Exhibit No. 35.

On December 29th, 1920, the Bankers Trust sent the following night letter to the National Bank of Commerce at Norfolk:

PLAINTIFFS' EXHIBIT 221

"Replying your telegram Southgate credit documents tendered by Lamborn in our opinion comply with terms

of credit Lamborn have exhibited blading dated Samarang September thirtieth covering sugars per steamer West Cheswald out of which delivery to cars at Philadelphia was made which complies with August/September shipment clause your credit do not know if sailing dates mentioned your wire refer this steamer. However this is question of steamer clearance which point is not covered in your credit and must not be confused with date of shipment as indicated by date of blading. If steamer Chifuku Maru originally declared by Lamborn no doubt contract with Southgate gives them the right substitute other steamer. All points mentioned your telegram are matter of contract between Lamborn and Southgate and do not concern terms your credit which have been complied with Injunction at present prevents Lamborn accepting payment but similar injunctions easily vacated. Unless you wire us to contrary will return documents to Lamborn notifying them you have instructed us as your agents under credit refuse payment. We and our counsel are of opinion Lamborn have strong case against you if payment refused. This wire sent for your information and guidance. Bankers Trust Company."

The conversation I had at that time was with both Mr. Kent and the attorney for the Bankers Trust Company who was present at that interview. There was an injunction pending. The substance of that conversation was that we were anxious to find out whether the Bankers Trust recognized the fact that the documents were in order according to the terms of the credit. We realized and they did too that the amount could not be paid until after the injunction had been vacated or dismissed. In fact, I said so myself.

T. S. Southgate & Company obtained an injunction in New York to restrain the bank from paying the letter of credit when documents were presented. By the bank I [fol. 160] mean the Bankers Trust Company, who were the paying agents for the National Bank of Commerce. The conversations I have given were during the pendency of that injunction.

After the injunction had been vacated I had another talk with Mr. Kent, Vice President of the Bankers Trust Company in New York on or about January 6, 1921, and the

following telegram was sent to the National Bank of Commerce at Norfolk, Virginia. Plaintiffs' Exhibit No. 227:

"Judge Burrough has vacated the order enjoining payment against presentation of documents under your credit one hundred five. Order will be entered today to that effect. Please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarrassing to yourselves and ourselves, Bankers Trust Company."

A copy of the certified order vacating the injunction was presented to the Bankers Trust Company about this time and payment was refused and the draft was protested. The ocean bill of lading of the steamship "West Cheswald" one of the documents which was left in the hands of the Bankers Trust Company for examination. They had it part of one day, I should say several hours.

The plaintiffs offered in evidence a file containing the entire correspondence between the defendant bank and the Bankers Trust Company, its agent in New York, in respect to the letter of credit and its non-payment, arranged in chronological order, the letters being marked Plaintiff's Exhibits Nos. 33, 34, 234, 36, 222, 223, 224, 225, 226, 227, 228, 31, 30, 229, and 230. They were read by Mr. Van Doren and the following are copies thereof:

"PLAINTIFFS' EXHIBIT #33

The National Bank of Commerce, Norfolk, Virginia

Dec. 11, 1920.

The Bankers Trust Co., New York City.

[fol. 161] GENTLEMEN: Referring to our letter of credit No. 105, dated May 11, 1920, established in favor of Lamborn & Co., 132 Front St. New York City in the sum of $53,123.84 for account of T. S. Southgate & Co., Norfolk, Va., covering purchase of 1,000 bags Java White Sugar, shipment August-September from Java by steamer to Philadelphia, which letter of credit was passed along to

Lamborn & Co. by you at our request and we presume is now held by them.

We are writing this letter to say that before payment of the funds is made to Lamborn & Co. against this credit, we desire to have an opportunity to personally examine the documents which are to be attached to their draft. We beg to ask, therefore, that you kindly notify us by wire when the documents are presented so that we can arrange to examine and approve them.

Your acknowledgment of and compliance with this request will be appreciated.

Yours very truly, A. E. Wharton, Ass't Cashier.

W/M."

"PLAINTIFFS' EXHIBIT #34

December 13, 1920.

The National Bank of Commerce, Norfolk, Virginia.

GENTLEMEN: Your favor of the 11th instant received and have taken note that we are to make no payments under the credit which you issued unless you have had an opportunity to examine the documents attached to the draft. Upon presentation of the documents we shall wire you immediately and trust that you can arrange to have the documents examined and approved in New York promptly.

We would suggest that you forward a copy of your letter to us to the beneficiary, as this is your letter of [fol. 162] Credit and the Bankers Trust Company acts simply as a paying agent.

Very truly yours, —— ——, Vice President.

JFS/RDW."

"Plaintieffs' Exhibit 234

Bankers Trust Company

FX Dept.

Cable Department

Date: Dec. 26/20.

Please send the following message;

To Natl. Bank of Commerce, City Norfolk, Va.:

Made up by A J K O K Charge to Collect.

Lamborn has presented draft and documents covering 1,000 bags sugar under your credit 105 account Southgate. Documents apparently in order. Have you arranged examine documents. Please wire."

"Plaintiffs' Exhibit 36

145N AJE 105.

MS Norfolk Va. 427 P Dec. 27, 1920.

Bankers Trust Co., New York:

Answering telegram we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eight, calling at Mascassar then Borneo and finally back to Samarang from whence sailed for New York October [fol. 163] seventeenth further that this ship was diverted to Philadelphia though originally intended for New York our credit specifically calls for shipment from Java August of September and Lamborn's failure to comply with this important requirement compels us refuse payment moreover our client has shown us letters indicating their sugars loaded on steamer Chifuke Maru which has never arrived.

National Bank of Commerce. 5:20 P. M."

"PLAINTIFFS' EXHIBIT #222

December 30, 1920.

National Bank of Commerce, Norfolk, Va.

GENTLEMEN: Re: Your credit No. 105 issued for account of Messrs. T. S. Southgate & Company in favor of Lamborn & Co., New York.

We enclose herewith a confirmation of our wire of yesterday's date regarding documents presented to us under the above credit.

We await your reply to our wire and remain,

Very truly yours, —— ——, Asst. Manager.

WJK/EH.

Enc."

"PLAINTIFFS' EXHIBIT #223

Bankers Trust Company

Cable Department

Date: Jan. 4, 1921.

Please send the following message:

[fol. 164] To Natl. Bank of Commerce, City Norfolk, Va.:

Made up by W J O K Charge to Collect.

Refer our telegram December 29 your credit favor Lamborn are informed injunction obtained by Southgate vacated. Please wire do you still desire we refuse payment as mentioned your wire December 27th."

"PLAINTIFFS' EXHIBIT #224

January 4, 1921.

National Bank of Commerce, Norfolk, Va.

GENTLEMEN: We enclose herewith confirmation of our wire of today, which is self-explanatory, and to which we await your reply.

Very truly yours, —— ——, Asst. Manager.

WJK/EH.

Enc."

"PLAINTIFFS' EXHIBIT #225

183NBZ 557P 20.
Norfolk, Va. Jan. 4.

Bankers Trust Co., N. Y.:

Replying to telegram are advised that terms of credit in favor Lamborn and Company not complied with we decline payment.

Natl. Bank Commerce."

[fol. 165] "PLAINTIFFS' EXHIBIT #226

Bankers Trust Company, New York

January 5, 1921.

Messrs. Lamborn & Company, 132 Front Street, New York, N. Y.

GENTLEMEN: Re: Credit #105 issued in your favor by the National Bank of Commerce, Norfolk, Va., for account of T. S. Southgate & Company.

Please be advised that we have received a wire from the National Bank of Commerce, Norfolk, Va., advising us that they decline to make payment under the above credit. As under this credit we are only the paying agents of the National Bank of Commerce in Norfolk, we are obliged to follow their instructions and are returning to you documents covering a shipment under this credit tendered to us in your letter of December 23, 1920.

We suggest that you take the matter up directly with the National Bank of Commerce, Norfolk.

Please acknowledge receipt of the enclosed documents, and oblige,

Yours very truly, W. J. K., Asst. Manager.

WJK/CA.
8 enclosures."

"Plaintiffs' Exhibit #227

January 6, 1921.

National Bank of Commerce, Norfolk, Virginia:

Judge Burrough has vacated the order enjoining pay-
[fol. 166] ment against presentation of documents under your credit number one hundred five order will be entered today to that effect please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarrassing to yourselves and ourselves.

Bankers Trust Company."

"Plaintiffs' Exhibit #228

1921, Jan. 7, P. M. 12:12.

A1 86 N 57.
MS Norfolk Va 11 48 A 7.

Bankers Trust Co., New York, N. Y.:

Southgate advises that expressed conditions of our credit number one hundred five have been grossly violated by sellers and declines to recognize payment of same in light of your repeated statements that you only acting as paying agent we cannot understand why you should feel embarrassed we reaffirm position outlined in our telegram January fourth to you.

National Bank of Commerce."

"Plaintiffs' Exhibit #31

January 8, 1921.

National Bank of Commerce, Norfolk, Va.

Gentlemen: Re: Your credit No. 105 issued in favor of
[fol. 167] Lamborn & Co. for account of T. S. Southgate & Company, your city.

In accordance with our exchange of telegrams of January 6th and 7th, we have advised Lamborn & Company of your

refusal to permit payment of their draft on us under the above credit for $48,009.81 covering shipment of sugar to T. S. Southgate & Company.

We have returned the documents to Lamborn & Company and have today been served with a notice of protest of the draft by Lamborn & Company for non-payment,

Very truly yours, W. J. K., Asst. Manager.

WJK/EH."

"Plaintiffs' Exhibit #30

United States of America,
State of New York, ss:

On the seventh day of January in the year of our Lord one thousand nine hundred and twenty one at the request of the holder thereof, I, Joseph N. Lo Medico, a Notary Public duly commissioned and sworn, dwelling in Kings County, did present the original instruments hereunto annexed, to a person in charge of the office of Bankers Trust Company, 16 Wall St., in the City of New York (being the place where the said instrument is payable), and demand payment thereof, which was refused:

And answer 'Will not pay':

Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents, do publicly and solemnly Protest as well against the Drawer and Endorsers of said instrument, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of said instrument.

[fol. 168] In testimony whereof, I have hereunto set my hand and affixed my Seal at the above date as aforesaid.

Joseph H. Lo Medico, Notary Public. (Seal.)

Lamborn & Co. New York.
Natl. Bank of Commerce, Norfolk, Va.
Bankers Trust Co. New York.
T. S. Southgate & Co., Norfolk, Va."

"PLAINTIFFS' EXHIBIT #229

January 14, 1921.

National Bank of Commerce, Norfolk, Virginia.

GENTLEMEN: In your letter of April 27, 1920, you established a credit in favor of Messrs. Lamborn & Company through the Bankers Trust Company. Later an injunction was issued prohibiting payment. This injunction was vacated by Judge Greenbaum and we then wired you for instructions on January 6th. In reply, you telegraphed us that your client advised you that conditions of your credit have been grossly violated. The documents were later presented again to us and protested as advised you in our letter of January 8th.

As the matter stands now, Messrs. Lamborn & Company will be obliged to sue you and as far as we can see, they are certain to win such suit exactly as they have others under similar circumstances. This being true, it seemed to us that as you had requested us to act for you and as it is our custom to endeavor to protect our friends and clients in every legitimate way, that it is our duty to advise you of some developments in connection with bankers acceptances that have taken place recently.

In the first place, due to the great drop in the price of sugar and some other commodities, many importers in the United States, as well as in other countries have endeavored to avoid their obligations. In the United States this has [fol. 169] been attempted, first through obtaining injunctions prohibiting American banks which had issued Letters of Credit from acting under them. Such injunctions are being vacated as rapidly as they come to trial and their issuance has reflected seriously upon the credit of American institutions. In other cases importers have endeavored to get their bankers to refuse to acknowledge obligations undertaken in Letters of Credit by claiming that the shipments were not made in accordance with their contract with the exporter.

The courts have held (decision of Judge Greenbaum, in the Appellate Division in New York) 'that an irrevocable letter of credit was a complete and independent contract, and that holders in good faith of drafts drawn under the

letters of credit were entitled to the absolute benefit of its terms; that the bank issuing the credit was in no wise concerned with any contract existing between the buyer and the seller, and that a breach by the seller of that contract had no bearing upon the bank's liability under the letter of credit. The effect of this decision is to relegate the buyer to an action at law against the seller for any damage that might have been occasioned under the contract.

There is no question about the correctness of this decision, nor of its value to American banking and business interests, for otherwise no foreign banker would dare negotiate drafts against letters of credit issued by American banks. If absolute fraud in the shipment exists on the part of the exporter, it does not change the situation in the slightest particular provided the terms of a letter of credit have been carried out and drafts must be accepted by the issuers of the credit. If this were not true, it would not be safe for banks to issue letters of credit; neither would it be safe for other banks to negotiate drafts under them. As a matter of fact, this position has not only been upheld in British courts, but in American courts as well under the decisions of Judges Greenbaum and Cohalan.

In your telgram of January 7th, you state 'Southgate advises that expressed conditions of our credit—have been grossly violated.' As a matter of fact, the importer, after he has delivered the letter to the exporter or beneficiary under the credit, has no voice in the situation whatsoever and it then becomes the duty of the bank to live up to its agreement. Such a large number of cases of this kind have occurred that foreign and domestic bankers, foreign [fol. 170] and domestic courts, firms and corporations and the Federal Reserve Board and the Federal Reserve Banks in the United States have become much exercised over the situation. It is our understanding that the question is being considered by the Federal Reserve Banks as to whether they shall not absolutely refuse, in the future, to buy acceptances of banks which have repudiated their credits and the concensus of opinion among bankers and others with whom I have talked is that the Federal Reserve Banks would be thoroughly warranted in doing so as such repudiation shows lack of good faith, as well as willingness to jeopardize the credit of American banks throughout the world.

In your telegram of January 7th you also state that you cannot understand why we should be embarrassed in case of your refusal to authorize the credit to be paid.

Embarrassment to us would arise in case suit was brought against us as we would not, under any circumstances, wish to have our name appear in the courts in connection with a refusal to accept under a letter of credit. While in this particular case your institution would, of course, bear the real burden of such discredit as might arise, yet it might not be clear to a careless reader of any decision that was rendered that we were not involved.

If we should open a letter of credit for a customer of ours and all the terms of the letter as issued by us had been lived up to, we would honor it regardless of whether our client was in existence as a going concern at the time of presentation, or not.

I make this statement merely to show you now strongly we feel about matters of this kind and how clearly we believe that such obligations as we assume under a letter of credit are ours, and not subject to change by the importer because of his desire, or any contracts he may have in force that are not contained in the letter of credit or whether he is solvent or otherwise.

We have gone into this matter confidentially with you in considerable detail because we felt that you would like to know exactly the situation and see what you might be subjecting yourself to in case you refuse an obligation without just cause, which frankly we canont find in this particular case. In spite of what we said about our own con- [fol. 171] nection in the matter, it is really your interests which are paramount and it hardly seemed to us right that you should subject yourself to the discredit that is almost certain to ocur in case this matter goes to court without letting you see the situation as it has come to us.

This letter is not written with any desire to argue you into taking any position that you do not believe advisable, but merely to give you such facts as we feel you should have in order to help you in determining what position you wish to assume.

Yours very truly, F. I. Kent, Vice-President.

FIK/RG."

"Plaintiffs' Exhibit #230

The National Bank of Commerce, Norfolk, Virginia

Jan. 22, 1921.

Mr. F. I. Kent, Vice-President Bankers Trust Co., New York City.

Dear Sir: I have received, read and carefully considered your letter of January 14th, having reference to the Southgate credit.

In the outset permit me to assure you that this bank has a conservative as well as a comprehensive appreciation of the need for exercising care in the handling of credit letters and fully shares with you the solicitude expressed as to any general tendency to seek to render them less dependable or inviolate.

It seems to me, however, in your letter you have in mind a general principle and argue the matter from that standpoint, rather than that of the individual case under discussion.

[fol. 172] In order that you may clearly understand our position in regard to this particular credit, permit me to say:

(1) This credit letter was made irrevocable only upon full compliance with the conditions of same.

(2) Because there were conditions to be complied with, the instrument was non-negotiable. We were, therefore, advised by you that your interest in same was nominal or that of agent only.

(3) In support of the client's contention that conditions of credit had not been complied with, there was submitted to officers and counsel of this bank five different shifting sets of declarations of shipment of this product, copies of which are herewith enclosed to you.

(4) In connection with these papers unmistakable government evidence was also exhibited that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter.

We submit, therefore, gentlemen, that there was justifiable evidence before us to warrant the action taken.

As before stated, we readily appreciate the need for the utmost care in preserving credits of this nature, but in all conscience it is but fair to consider also the rights of others at the same time. It is one thing to stand for the technical observance of a principle, but quite another in doing so to subject a respected client to so manifest injustice as was apparent in this case and thus shift the burden of suit upon him.

So far as the courts are concerned, we have no fear of the result whatever from this standpoint, but naturally regret very greatly that any conditions should arise to occasion any strain upon our heretofore pleasant and friendly relations.

Yours very truly, (Signed) Nathaniel Beaman, President."

[fol. 173] "New York, Aug. 30/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We hereby declare that the steamships 'Chifuku Maru' and 'Washington Maru' or substitute will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920.

Very truly yours, (Sig'd) Lamborn & Co."

"New York, Sept. 29/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We have received advices that the S./S. 'Chifuku Maru' carrying your Javas purchased under contract dated April 23, 1920, sailed from Java Aug. 22d, and is due to arrive the latter part of October.

Yours truly, (Sig'd) Lamborn & Co."

"New York, Nov. 10/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: On Sept. 29th we notified you that the steamer 'Chifuku Maru' was due to arrive the latter part of October.

We are now in receipt of advices to the effect that this [fol. 174] steamer is not expected to arrive before the last half of November.

Yours truly, (Sgd.) Lamborn & Co."

"New York, Dec 13/20.

T. S. Southgate & Co., Norfolk, Va.

Contract April 23, 1920, 1,000 bags, 10% more or less

DEAR SIRS: On November 10, 1920, we advised you that the steamer 'Chifuku Maru,' previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of Nov. 1920, had been unavoidably delayed owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer 'West Cheswald,' carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Yours truly, (Sgd.) Lamborn & Company."

"New York, Dec. 16/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: Please be advised that the S./S. 'West Cheswald' is now in the Port of Philadelphia, with sugars [fol. 175] to apply against your contract AB-522, dated April 23, 1920.

This is for your information.

Yours truly, Lamborn & Company."

Afternoon Session

N. NELSON KEEN resumed the stand for further direct examination:

By Mr. Van Doren:

I testified this morning that I saw this telegram, Plaintiffs' Exhibit No. 36, but I wasn't allowed to read the entire telegram. I saw it in the hands of the officer of the bank but I wasn't allowed to see its contents. I saw in its entirety Plaintiffs' Exhibit 227. That is the one I saw in the hands of one of the men in the bank (indicating Exhibit

36). At the time I was talking with the Bankers Trust Company I was not told of the contents of Plaintiffs' Exhibit 36, in its entirety. I recall from reading the telegram that the question of clearance was brought up and I explained to the gentleman who had the wire that our contract called for shipment and we weren't interested in clearance from Java. That is as far as I can remember of the contents of it. He said I had not shipped as the telegram said she had cleared on a certain date.

By the Court:

Q. And you say the loading on board was all that your contract required and it didn't make any difference when she sailed?

A. Yes, sir.

By Mr. Van Doren:

Q. Did the Bankers Trust Company ever say to you that non-payment of this draft was because of the nature of the bill of lading of the cargo of the "West Cheswald"?

A. No, sir, they did not.

Q. Did you rely on the stated ground of non-clearance or non-shipment in time, August and/or September, from Java in your subsequent conduct of this matter?

A. We did.

Q. Could you have given sugar to the amount of a thou-
[fol. 176] sand bags to T. S. Southgate & Company? Could you have shipped F. O. B. cars a thousand bags of this sugar to T. S. Southgate & Company from the cargo of the "Washington Maru"?

A. We could.

Cross-examination.

By Mr. Taylor:

I know what disposition was made of the entire cargo out of the "Washington Maru." The American Stores, Philadelphia, had 7,250 bags of the cargo of the "Washington Maru," the McMahon & Leib Company of Anderson, Indiana, had 400 bags. The Gammeter Commercial Company, 1,000 bags. A Blanton Grocery Company, 1,100 bags;

Jesse C. Stewart 281 bags, making a total of 9,931 bags. My recollection is that the balance of the number of bags were used for filling, sweepings, etc.

It is a fact that disposition was made at Philadelphia of the entire sugar cargo of the "Washington Maru," that disposition was made pursuant to previous declarations of that sugar in the "Washington Maru," substitutions finally from the "Chifuku Maru" from the "Washington Maru."

Q. So when the "Washington Maru" landed on December 19th all of that sugar by reason of substitutions and designations had been allocated to the parties whose names you have read?

A. I don't say that it had because a great number of these people had objected to the substitution of the "Washington Maru" for the "Chifuku Maru" and wanted us to leave the sugar on the "Chifuku Maru."

Q. But it was finally taken by them, was it not?

A. Yes.

Q. Pursuant to these substitutions and designations?

A. Yes, sir.

Q. And that disposed of your entire cargo out of the "Washington Maru"?

A. Yes, sir.

Q. Why did you divert the "West Cheswald"?

A. Two reasons, maybe three. The first reason was that we did not think that the "Chifuku Maru" would reach Philadelphia in order to deliver sugars in time to negotiate the credits which were up on the various contracts. The second reason was we had a right to do it. The third reason was it suited our purpose best to do it.

[fol. 177] Q. It is a fact that from September, 1920, until December 13, 1920, when this diversion was made by radio, the steamship "West Cheswald" was at no time destined to Philadelphia, Pennsylvania, was she?

A. After she had passed Port Said, she was coming on a natural course to New York.

Q. And she would have, in all human probability, arrived at New York had she not been diverted by radio?

A. That is correct.

Q. What was necessary for your firm in order to so divert the "West Cheswald" from her destination in New York to Philadelphia?

A. We had to, of course, communicate with the Shipping Board, who, in turn, communicated with the master of the ship to see how the cargo was stored and, of course, agreeing to pay the consideration of such diversion.

Q. You had no right to divert except with the consent of the owner of the ship?

A. Not after she passed Port Said.

Q. And, of course, she was in the Atlantic off the east coast of the United States at the time of diversion, was she not?

A. Yes, sir.

Q. And I believe it has been either stated or testified here that it cost your firm $1.00 per ton for some thirty-seven hundred tons of sugar for exercising that diversion?

A. That is correct.

Q. And if you had not made these arrangements the ship, as I say, would have perhaps reached New York in due course?

A. In the natural course, yes, sir.

Q. The "Washington Maru" landed on December 19th. It didn't take her very long to discharge her cargo because she only had a little over ten thousand bags on board. She was in port the same time that the "West Cheswald" was discharging but the exact date when she completed, I couldn't tell without our records. I would say it took four or five days. The sugar went off to our various customers as promptly as it was discharged from the steamer. It was loaded on cars, duty paid, and bills of lading issued to the various parties.

On or about December 23rd, 1920, Lamborn & Company furnished the Bankers Trust Company with a copy of the ocean bill of lading of the "West Cheswald."

I knew when I was discussing the telegram of December 28th with the representative of the Bankers Trust Company that I was not told the entire contents of that telegram. [fol. 178] I was only told about the shipment which they termed as clearance. I knew that there were some other portions of the telegram. I could see from the telegram it was a lengthy telegram.

I saw a letter which I have identified dated January 5, 1921. It has my stamp on it. After that I myself returned to the office of the Bankers Trust Company with all of the

documents pertaining to this case, at which time they were protested.

I testified at a former trial as follows:

"Q. I will ask you specifically whether at that time, January 6th, 1921, the officer or officers of the Bankers Trust Company stated any objection to you as to the form of contents of your draft and shipping documents?

A. No, they did not.

Q. Did you demand payment of the draft?

A. Yes.

Q. On the 6th of January, 1921?

A. Yes, sir.

Q. Was payment made?

A. No, sir.

Q. What became of the papers, the draft and shipping documents which you had taken with you?

A. The draft was protested and the documents were taken back by us."

Redirect examination.

By Mr. Van Doren:

The Gammeter Commercial Corporation purchased a thousand bags, 10 per cent more or less. They refused to take the sugar off the "Washington Maru," on the ground of substitution—substitution of the "Washington Maru" for the "Chifuku Maru." That concern brought an action to cancel the contract, and an injunction. The Blanton Grocery Company refused to take the sugar from the "Washington Maru," on the same ground. Their contract was for 1,100 bags, 1,000 bags, 10 per cent more or less. They brought an action to cancel the contract. The McMahon & Leib Co. refused to take this sugar from the "Washington Maru," upon the ground of substitution of steamers—substitution of "Washington Maru" for the "Chifuku Maru." They didn't want the sugar. The American Stores refused to take their sugar. I testified [fol. 179] the quantity was 7,250 bags but I believe the quantity was 7,150. All four of those parties refused to take the sugar upon the ground that we substituted the "Washington Maru" for the "Chifuku Maru."

We negotiated with the American Stores before they took the sugar, about a week or ten days—a week anyhow. The Blanton Grocery Company took and paid for the sugar after the injunction was vacated. They all wanted sugar from the "Chifuku Maru"; that is what they contended. We had the right to give 10 per cent less on all of these contracts.

If we had given these parties 10 per cent less, with what was left over of the cargo it would have amounted to 1,004 bags. We could have given all of those parties the amount of sugar which the contract called for and had a thousand and four bags left over. There wouldn't have been any objection on their part to taking less at that time, the way prices of sugar were going down.

Recross-examination.

By Mr. Taylor:

That would have made no difference in the final event; we would have simply sold to one party instead of another. We did tender these sugars to the various parties named as subsequently taking it. We delivered 9931 bags. And we made the delivery pursuant to the tender. We kept the tender alive from the time the ship arrived until the time of delivery to our customers.

By Mr. Van Doren:

The American Stores concern was located at Philadelphia, Pennsylvania. Their sugar remained, pending an adjustment of the matter with them, on the steamship wharf where the "Washington Maru" was docked. Mr. Lindgren, the partner in Philadelphia, and myself carried on the negotiations with the American Stores. They finally took the sugar and paid for it. There was an interval when they had refused the sugar. I would say something like a week. It might have been a little bit longer. During that interval the sugar was on the pier of the steamship company, in a separate pile. That week was the latter part of December, around Christmas time.

STIPULATION AS TO TESTIMONY OF CERTAIN WITNESSES

It was stipulated between counsel that the testimony [fol. 180] of James Lutz, John Boham, John Teehan, John F. Nolan, Frederic A. Hamann and William H. Lignante, if read, would show that there was unladen from the steamship "West Cheswald" at Philadelphia, Pennsylvania, on or about December 16, 1920, 1,000 bags of about 224 pounds each, good and merchantable Java white sugar of the net landed weight of 222,680 pounds, as shown by the weighmaster's certificate, Plaintiffs' Exhibit 19, and the invoices already marked in evidence as Exhibit Nos. 20 and 20-A, and which weight certificate and invoices were presented with the drift to the Bankers Trust Company on or about December 23, 1920, and that the duty thereon had been paid to the United States Government and that thereafter the said 1,000 bags of Java white sugar so weighed and so duty paid were laden free on board, that is, free of all charges, on railroad cars at Philadelphia, Pennsylvania, on the lines of teh Pennsylvania Railroad Company, and that the said Pennsylvania Railroad Company duly issued a bill of lading for the said 1,000 bags of Java white sugar, which said bill of lading has heretofore been offered in evidence as Plaintiffs' Exhibit 16-A.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Connor: The plaintiffs offer in evidence the depositions of the following persons, William R. Bassett, Robert L. Goldsborough Francis H. Goecker. On another point entirely we offer the testimony of the witness, Richard Jones, insurance expert. We propose to prove by him that Southgate could have insured this sugar and the diversion from the "Chifuku Maru" to the "West Cheswald" would not have affected his insurance at all. There is an actual policy issued to cover a like case.

The Court: Do you object to this evidence?

Mr. Taylor: Yes.

The Court: The depositions of the three witnesses, Bassett, Goldsborough and Goecker, which you offer relate entirely to the trade meaning and custom with relation to

the term "shipment" as employed in the contract in question?

Mr. Connor: *Connor:* Yes, sir.

The Court: And the depositions were taken in response to the proposed amendment to the plaintiffs' notice of motion?

[fol. 181] Mr. Van Doren: Yes, sir.

The Court: Your objection is the same objection made?

Mr. Taylor: Based upon the same grounds that I interposed to the notice of motion.

The Court: As I intimated I would, when I sustained that motion, I sustain the motion to reject the depositions of these three witnesses in question. The insurance matter I don't recall having heard anything about.

Mr. Van Doren: We save an exception.

Mr. Taylor: The insurance question is simply this, showing the general custom with reference to insurable interest.

Mr. Van Doren: We have taken testimony, if Mr. Taylor will allow me to describe it and your Honor will hear what I have to say, I believe for the first time, definite positive testimony, accompanied by insurance forms showing what is the practice of marine insurance of profits by purchasers in the position of T. S. Southgate & Company and the testimony is to the effect that there is such a practice, that it is well known, long established, that he had a right to take out insurance on profits the moment of making his contract, that such insurance is provided for by settled forms issued by rules of the maritime insurance brokers and that those forms provide for substitution of steamers, naming a new steamer, for diversion of steamers, and that in this case the substitution of the "West Cheswald" for the "Chifuku Maru" would have occasioned no prejudice to such insurance if T. S. Southgate & Company had taken it out, nor would the diversion of the "West Cheswald" when off the Jersey coast, when going to New York, to Philadelphia, be anything more than a mere matter to report to the underwriters, that they would have welcomed that in place of the steamer that was delayed by accident at Port Said, so if that evidence is to be believed and not controverted we have here for the first time evidence of just exactly what is an insurance of profits and whether or not it could be affected

by the substitution which has been complained of throughout this county under this contract and whether or not it could have been affected by the diversion of the "West Cheswald". We had hoped to introduce it so that that ground of sustaining this technical question of original [fol. 182] lading on the "West Cheswald," not being to Philadelphia but "Port Said option New York" might be cut out of the case. We offer it for that reason.

The Court: I haven't read the decision of the Circuit Court of Appeals recently but my recollection is they didn't place their interpretation of the agreement on that ground.

Mr. Van Doren: We are prepared to show by the evidence of Mr. Richard Jones that T. S. Southgate & Company, the bueyer's right of insurance of profits on this thousand bags of sugar, 10 per cent more or less, would not have been prejudiced by any substitution of steamers carrying it; it would only mean a matter of redeclaration of steamers to the underwriters, that that is provided for by the insurance form and that diversion of a given steamer from New York to Philadelphia so as to make delivery at Philadelphia is also provided for by said forms and would not have prejudiced said right.

The Court: As I understand the question, the purpose of the offer of testimony is to meet the suggestion in the opinion that the buyer would have an insurable interest in it during the voyage by reason of the title that would accrue to him under the contract on arrival and delivery and the profits that might be made in case of a rise in market. But "a policy of insurance for the iron on a voyage from Glasgow would not cover a voyage from Leith." That is a quotation from the Supreme Court in Filley v. Pope and the Circuit Court of Appeals has said that that is applicable to this case because in this case although the title to the sugar was not to pass until delivery f. o. b. cars Philadelphia, the buyer had an insurance interest in it and had the sugar market continued to advance he might well have desired to insure it against what he would make from his contract. The insurance effected on sugar from Java to Philadelphia would not have covered sugar bound for New York. I understand the purpose of the offer of testimony is to show that the Court misapprehended the facts in arriv-

ing at that conclusion. I think the evidence is inadmissible under the circumstances.

Mr. Van Doren: Your Honor hakes the same ruling with offer with the depositions the exhibits attached thereto, one a typical binder and the other a certificate of insurance or [fol. 183] application for insurance. We offer these documents marked Plaintiffs' Exhibit Y.

Mr. Taylor: I object.

Mr Van Doren: Your Honor makes the same ruling with respect to them?

The Court: Yes.

Mr. Van Doren: We except. It is conceded between counsel that Lamborn & Company paid the duty on sugar on all of these ships, "Chifuku Maru", "Washington Maru", and "West Cheswald". The plaintiffs rest.

Mr. Taylor: We move for a verdict on the plaintiff's evidence.

Charge to the Jury

Hon: D. Lawrence Groner, Judge: Gentlemen of the jury, this is an action at law brought by Lamborn & Company against the National Bank of Commerce of Norfolk. I have no doubt you gentlemen have understood by now that this is the second trial of this case in this court. The determination of the first trial and the conclusion that I came to was that the rights of the parties was a matter of law and didn't involve any question of fact for submission to the jury, the contract being admitted and, in my opinion, the evidence conclusively showed a compliance with the contract and entitled the plaintiff to a verdict and judgment in its favor.

The case was then taken to the Circuit Court of Appeals and that court held this court in error in so deciding and construed the contract differently from its construction by me at the previous trial and sent this case back for a new trial to be had in accordance with the opinion of that court.

Of course, it is not necessary that I should say to you gentlemen that we are all bound by the findings of the Appellate Court and they have decided that notwithstanding the contract for shipment of sugar of a particular kind and quality was complied with and the tender of the kind and quality of sugar shipped from the identical place provided

in the contract and within the time in the contract, but because the journey of that vessel was not in accordance with the terms of the contract, that is, instead of being destined to Philadephia it was destined to New York, that that was [fol. 184] a breach of the contract, although the vessel ultimately reached, and within the time limit, the port of Philadelphia.

The case has come back now and has been tried again and the evidence, except in one respect, is substantially the same as on the previous trial and the plaintiffs' right to a recovery, of course, depends upon a showing on their part that they had done what they had contracted to do. Admittedly they have done what the Circuit Court of Appeals has held is not a compliance with the contract so that unless there is something new and different in this case than in the former case, without regard to what your views of the rights of the matter might be or my views may be, we are both bound, as I said a moment ago, to carry out the mandate of the upper court.

Now, the plaintiff urges that there is a new element in this case, introduced by the production of the letter passing between the defendant Bank of Commerce and the Bankers Trust Company of New York which is described in those letters as the paying agent of the local bank. I have carefully listened to those letters, the contents of them and the point urged by counsel for the plaintiff that there was an election of remedies and rights, that the defendant in denying the compliance with the contract or carrying out of the contract put the ground upon something other than the ground it now urged in its defense. I don't think the letters bear that construction. I don't think it is possible to give them that slant. I think they are clearly not susceptible of any other conclusion than that while other grounds of defense were urged as a justification for refusal to accept the sugar, the ground now urged was among those and there is no limitation or selection or election of a particular defense and a waiver of all others, so that in the view that I now take of this case, the situation is as it was at the last trial plus the authoritative declaration of the Circuit Court of Appeals that what admittedly was done was not a compliance with the terms of contract. So that it becomes my duty in this case at this time, under those

circumstances, to grant the motion of the defendants' attorney for an instructed verdict in favor of the defendant.

Mr. Van Doren: The plaintiffs respectfully except.

[fol. 185] And the Court further certifies that the foregoing constituted the evidence on behalf of the plaintiffs, and was all the evidence offered and admitted on their behalf.

Given under my hand this 26th day of August, 1925.

D. Lawrence Groner, U. S. D. J.

In United States District Court

Plaintiffs' Certificate of Exceptions No. 2—Filed August 26, 1925

The Court certifies that upon the trial of this cause the plaintiffs offered in evidence the depositions of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker stating that the depositions showed the witnesses named had testified, and the plaintiffs expected to prove by said depositions and the testimony of the said witnesses that at all the times mentioned in the notice of motion for judgment there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression:

"F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers

until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessels or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa.; and that the said quoted expression was so interpreted and understood by the trade; [fol. 186] but the Court excluded the aforesaid depositions and the testimony of the aforementioned witnesses, declining to allow the introduction thereof, to which ruling of the Court, at the time of said ruling, the plaintiffs excepted and tendered this their second certificate of exceptions, which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the Rules and Practice of this Court.

And the Court further certifies that the deposition and testimony excluded by the Court put in narrative form is as follows:

DEPOSITION OF WILLIAM R. BASSET TAKEN IN NEW YORK CITY ON MARCH 30TH, 1925

Direct examination.

By Mr. Bentley:

I reside in New York City. I am connected with Minford, Lueder & Company, whose address is 99-101 Wall Street, New York City.

I have been in the sugar business for thirty-five years; during that period of time I have been a broker handling domestic and foreign refined and raw sugars. Prior to joining Minford, Lueder & Company I had my own concern. I was with Minford, Lueder & Company since January 1st, 1917. My duties with that concern were buying and selling sugars of all kinds. In the course of my duties I bought and sold Java white sugar during the years 1919, 1920 and 1921. Minford, Lueder & Company's dealings in Java white sugar during those years amounted to over 100,000 tons, of which I was personally concerned with three-fourths. During those dealings I came in contact with many other sugar houses; pretty much the whole trade came into our office; we were brokers for a number of large importers and pretty much the whole trade came into our office to buy sugar of us or through us, sugar of various dealers.

I am familiar with the customs and practices of the trade as they existed in 1920. The expression:

"F. O. B. cars Philadelphia, Pa., landed weights, ship-
[fol. 187] ment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia."

had a definite meaning among buyers and dealers of Java sugars in 1920.

"Q. Will you state what that meaning was?

"A. My understanding of such a contract would be that the seller was to ship from Java in the months designated and deliver those sugars without unreasonable delay at Philadelphia and there put them aboard cars without unreasonable delay.

"Q. Was that the general understanding in the trade?

"A. I think so, yes."

That understanding was a general one, well known as far as my experience goes and uniform.

"Q. Will you state whether or not the purchaser had any interest in the form or nature of the ocean bill of lading under such an expression as understood by the trade?

"A. The buyer had the right to be assured that the sugars were shipped from Java in the time designated and the usual evidence of that was the bill of lading.

"Q. And beyond that what interest did the purchaser have in the bill of lading, as that expression was understood among the trade?

"A. Unless the conditions of some letter of credit altered it, that essentially is the meaning. A letter of credit or some special understanding might modify it; but that is the purport of such a contract.

"Q. Will you state whether or not it was the understanding among the trade that under that form of contract the vessel at the time of loading was to be destined for any particular port?

"A. Do you mean by that limited to any particular port?

"Q. No; whether it must be destined for any particular port.

"A. The contract read 'shipment to Philadelphia,' in this case, and that meant that the sugars must be delivered by steamer at Philadelphia. Does that answer the question?

"Q. Yes. Will you state whether or not under that form of contract as understood by the trade the purchaser, the buyer, had any interest in the course and movement of the [fol. 188] vessel or in the incidents of the voyage?

"A. Generally speaking, no. There would be a possible exception in the case of proving unreasonable delay, or anything of that character.

"Q. Were those meanings and understandings you have testified well known and uniform throughout the sugar trade among buyers and sellers of Java sugars in 1920?

"A. Those with whom we dealt had that opinion and understanding."

Cross-examination.

By Mr. Taylor, Jr.:

"Q. Mr. Bassett, you have testified concerning a certain custom with reference to the sugar trade and you have qualified your answer to a question propounded to you by Mr. Bentley that said custom would be qualified or would be overcome where there was in existence a written contract or letter of credit; is that correct?

"A. No. No, sir.

"Q. Would not the letter of credit or the written contract stand or fall on its own terms?

"A. I stated that the certain terms were only to be understood otherwise in case there was something in the letter of credit prescribing different terms, otherwise the understanding was as I have stated.

"Q. The answer which you gave to Mr. Bentley's last question was correct, was it not?

"A. As I understood it, I would like to have it read again.

(Testimony repeated by the stenographer.)

"The Witness: That is perfectly clear.

"Q. But the letter of credit would be controlling in spite of the custom, would it not, Mr. Bassett?

"A. I have seen so many letters of credit, interpreted in so many different ways, that I would not say that there was any possibility of answering that question on my part accurately. That is the honest truth.

"Q. Do I understand then that you would be unable to construe the terms of the letter of credit?

"A. The courts have construed them in various ways, and I would not attempt to put down any dictum at all.

[fol. 189] "Q. You were questioned with reference to certain words, namely, as follows:

'F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.'

and you stated what was required of the seller in such case. Did or did you not say, Mr. Bassett, that at the time of the shipment the goods were to be shipped on a vessel destined for Philadelphia?

"A. My recollection is that I said, 'shipment from Java, delivery by steamer at Philadelphia.' That was the usual custom. If you will read me where I have stated differently, that might affect this answer. I do not think I used the word 'destined' at all.

"Q. When would that destination be determined under provisions of the question such as I have quoted to you in my question?

"A. When would the destination be determined? I have stated it would be shipment from Java, delivery at Philadelphia without unreasonable delay.

"Q. In other words, in your opinion, the vessel would not have to be destined for Philadelphia at the time the goods were loaded on board?

"A. That is correct."

DEPOSITION OF ROBERT L. GOLDSBOROUGH TAKEN AT NEW YORK CITY ON MARCH 30TH, 1925

Direct examination.

By Mr. Bentley:

I reside at Stapleton, Staten Island, New York. My occupation is that of buyer and seller of raw sugars. I am connected with E. Atkins & Company, of 90 Wall Street, New York City.

I have been in the sugar business for about twenty-six years. During that period of time I have been buying and selling practically all of the time. I was connected with L. W. Minford & Company, now Minford, Lueder & Company, for about thirteen years. I left them in 1912. I was connected with Bowerman Brothers at 83 Wall Street, New York City, for eight years from 1912 to 1920. Left them on [fol. 190] July 1st, 1920, when I went to E. Atkins & Company, where I have remained ever since. During that period of time I have been engaged in buying and selling sugars of all kinds—raw and refined—in New York City. I have dealt in Java White Sugars as broker when I was with Bowerman. During my experience I have bought and sold large quantities of Java sugars, many cargoes of it. I am not able to state how many bags, but a cargo generally varies from 1,000 tons to 5,000 tons. I have made a large number of contracts for the purchase and sale of Java Sugars. I think it would be less than 100. In the course of my business I came in contact with other buyers and sellers of Java sugars. I cannot say that there was a large number of them because I do not think there was any large number in the whole business. I met most of them and knew them all.

I am familiar with customs and usages and understandings in the trade as they existed in 1920. It was part of my business, I do not say that I know it all.

The expression: "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia" had a definite meaning among buyers and sellers of Java sugars in 1920.

"Q. Will you state what that meaning was?

"A. I would say that the seller would have to have his bill of lading dated either August or September and he would have to deliver the sugars aboard cars at Philadelphia.

"Q. What was that meaning if there was one in respect to the form of the ocean bill of lading?

"A. The ocean bill of lading would have to be dated August or September.

"Q. Anything beyond that?

"A. No. I think it would have to be dated August or September. It would not have to be dated both months, but it would either have to be August or September, with a certain date, the day the sugars were delivered to the steamer.

"Q. Will you state what was the meaning of that expres- [fol. 191] sion in respect to the buyer's interest in the form of the bill of lading?

"A. The only interest the buyer would have in the bill of lading would be that it was according to the contract, that is, the bill of lading must be dated according to the shipment.

"Q. Will you state what was the understanding of the trade in respect to the buyer's interest in the course and movement of the vessel or in the incidents of the voyage?

"A. I do not think a buyer would have any real interest in the course of the steamer coming over, except that naturally he would want it to come over as soon as it could after it was shipped.

"Q. But otherwise what, if any, interest?

"A. I do not think he would have any interest.

"Q. State whether or not it was the understanding of the trade that under that form of words the vessel at the time of loading must be destined for any particular port.

"A. No. It would not have to be destined for any particular port as long as the ship went to the port that it was bought for: it would have to go to Philadelphia.

"Q. And will you state whether those understandings and practices as you have testified to them were well known and uniform among buyers and sellers of Java sugars in 1920?

"A. Among the regular trade buyers, experienced buyers, it was; but there were a great many people bought sugars who did not understand the custom.

Cross-examination.

By Mr. Taylor:

"Q. Mr. Goldsborough, you stated that under the provisions as read to you or stated to you by Mr. Bentley, namely, that of 'F. O. B. cars, Philadelphia,' etc., it would

be required of the seller that the bill of lading be dated some time in August or September, 1920.

"A. If it was sold for August-September shipment.

"Q. I mean under the terminology which he used in his question. At that time what destination would be shown in the bill of lading for a particular shipment of sugars under those terms?

"A. I do not think it would be necessary to show any destination.

"Q. Did you not, Mr. Goldsborough, attempt or did you not say what would be expected of the seller in com- [fol. 192] plying with those conditions which have been recited?

"A. It would be expected of the sellers to deliver the sugar at Philadelphia.

"Q. How would you determine whether or not that was a shipment to Philadelphia?

"A. By the steamer going to Philadelphia.

"Q. And is not the shipment made when those goods are loaded on board the vessel or vessels during the months required?

"A. No, not according to my interpretation; for we often ship goods for August and ship them to any port after the clearance.

"Q. But where it is required that they be shipped to Philadelphia, would not that destination be named in the bill of lading covering the shipment in question?

"A. No, not necessarily. I think that a shipper would have a right to bring the sugars to New York and ship them by rail from here to Philadelphia, as long as he delivered them in cars at Philadelphia.

"Q. Where it is required to be shipped by steamer or steamers from Java to Philadelphia?

"A. Did the contract call for shipment from Java to Philadelphia; direct shipment?

"Q. The contract required this 'f. o. b. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by seamer or steamers to Philadelphia.'

"A. The steamer did go to Philadelphia.

"Q. Do you know whether or not it was intended that it was to go to Philadelphia at the time the cargo of sugars was loaded on board at Java?

"A. I do not; but I should not think that would make any difference."

Redirect examination.

By Mr. Bentley:

According to the understanding in the trade under the form of language quoted it is not necessary for the ship on which the sugars have been laden to call at Philadelphia as its first American port of call. According to the understanding of the trade a shipment in Java during the contract period under a bill of lading reading "Port Said [fol. 193] option New York" was a shipment from Java by steamer or steamers to Philadelphia, assuming that the vessel proceeded from Port Said to Gibraltar and thence to Philadelphia as her first American port.

Recross-examination.

By Mr. Taylor, Jr.:

"Q. Under a contract of the character of the one which we have before us, in your opinion it would be permissible, would it not, to ship this lot of 1,000 bags of sugar to be delivered to T. S. Southgate & Company from Java to New York and deliver said shipment to the pier at Philadelphia after the same had been transported from New York to Philadelphia by railroad cars?

"A. It would if in the contract it did not say anything about direct shipment to Philadelphia."

Redirect examination.

By Mr. Bentley:

"Q. In your opinion, would it be of importance if it was shown that the vessel on which these sugars were transported from Java to this country had been diverted from New York to Philadelphia?

"A. I think it would be the seller's duty to try to get the sugar to Philadelphia as soon as possible."

Deposition of Francis H. Goecker Taken in New York City on March 30th, 1925

Direct examination.

By Mr. Bentley:

I live at Ridgewood, New Jersey; I am a sugar broker by occupation. I have my own concern, and represent the St. Lawrence Sugar Refineries of Montreal, Canada.

I have been in the sugar business for thirty years. For twenty-four years I was connected with Gravenhorst & Company, New York City, and for eight years I have been [fol. 194] by myself. When I was with Gravenhorst & Company I handled all the details of the sugar. I started from the bottom up, and toward the end I was buying and selling sugar. Since I have been out for myself I have bought and sold sugars of all kind. I bought and sold Java White Sugars at the end of 1919 and in 1920, amounting to approximately 40,000 tons or 400,000 bags. In the course of my activities in buying and selling Java sugars I came in contact with other buyers and sellers of Java sugars, principally with other brokers, about twelve to fifteen. I have made or negotiated at least sixty contracts for Java Sugars.

The expression "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia," had a definite meaning among buyers and sellers of Java Sugars in 1920.

"Q. Will you state what that meaning was?

"A. I would say that the seller had title to those sugars until they were placed F. O. B. cars Philadelphia.

"Q. What was the meaning or understanding of the trade with respect to the form of the ocean bill of lading?

"A. On a contract F. O. B. cars Philadelphia, there was no ocean bill of lading required; simply a railroad bill of lading.

"Q. Was it necessary that the ocean bill of lading should be in any particular form, as understood in the trade?

"A. I do not think so.

"Q. What was the understanding of the trade in respect to the purchaser's interest in the course and movements of the vessel on which the sugar was transported?

"A. Simply that he was to be told that it was on a steamer and that shipment was made during the months specified in the contract.

"Q. The vessel at the time of loading must be destined for any particular port?

"A. Not necessarily so, no, sir.

"Q. And that was the understanding of the trade as it existed in 1920?

"A. Yes, sir.

[fol. 195] "Q. Were those understandings or practices as to which you have testified well known among buyers and sellers of Java sugars in 1920?

"A. Generally understood, yes, sir.

"Q. And uniform?

"A. Practically uniform.

"Q. Will you state whether or not in 1920 you were familiar with the understanding-, customs and practices of the trade in Java sugars as they existed at that time?

"A. I was.

"Q. And you are now?

"A. I am now, yes, sir."

Cross-examination.

By Mr. Taylor:

"Q. You have testified with reference to what would be expected of the seller in complying with the terms of a contract containing the provisions which have been stated to you in former questions. Did you not have in mind what would be required with reference to delivery and that alone?

"A. No, I would imagine with reference to shipment.

"Q. When would shipment begin?

"A. As soon as it was laden on the steamer.

"Q. And a shipment from Java to Philadelphia would require that it would be shipped, be designated at that time as consigned to Philadelphia, would it not?

"A. The steamer's name would have to be given. Not necessarily to Philadelphia.

"Q. And why not.

"A. Because it could go to any other port.

"Q. Would that be a shipment, then, from Java to Philadelphia?

"A. I think it would.

"Q. You have also stated the interest of the shipper in the lot of sugar in question. Would not the buyer have an insurable interest in that shipment of sugar?

Mr. Bentley: That is objected to on the ground that it calls partly at least for a conclusion of law; it calls for an opinion of the witness and partly at least for a statement of fact in reference to a business with respect to which it has not been shown that the witness has any knowledge or connection.

"A. He would."

[fol. 196] Redirect examination.

By Mr. Bentley:

I have never been engaged in the insurance business. I think that the buyer could insure his profits under the provision quoted. The fact that a steamer had been declared from Java on a certain contract of sugars F. O. B. cars Philadelphia would, I believe, permit the buyer to have an insurable interest on a contract of that kind. I never placed any insurance on a contract of that kind. I never saw a policy of insurance on a contract of that nature, nor did I ever make application to any insurance brokers for such insurance. I feel certain that insurance could be obtained. This certainly is derived somewhat from personal experience; my experience in regard to insurance is limited to c. i. f. contracts.

Recross-examination.

By Mr. Taylor, Jr.:

"Q. Is it or is it not the fact that your experience in handling sugars is limited to c. i. f. contracts?

"A. It is not."

Given under my hand this 26th day of August, 1925.

D. Laurence Groner, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Plaintiffs' Certificate of Exceptions No. 3—Filed August 26, 1925

The Court certifies that upon the trial of this cause, the plaintiffs offered in evidence the deposition of Richard Jones and the exhibits attached thereto, stating that the deposition showed, the witness named had testified, and the plaintiffs expected to prove by said deposition and the testimony of said witness that the buyer, T. S. Southgate & Company, under the form of contract in question had no insurable interest in the sugar until it had been placed f. o. b. cars Philadelphia, Pa., that his right of insurance was limited to a right to insure his profits arising from his contract, and that such right would not have been [fol. 197] affected by a substitution of steamers, the diversion of the "West Cheswald", or the form of the ocean bill of lading under which the sugar in question was carried or the destination intended at the time of loading; but the Court excluded the aforesaid deposition and the testimony of the aforementioned witness, declining to allow the introduction thereof, to which ruling of the Court at the time of said ruling the plaintiffs excepted and tendered this their third certificate of exceptions, which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the Rules and Practice of this Court.

And the Court further certifies that the deposition and testimony excluded by the Court put in narrative form and the exhibits annexed thereto are as follows:

DEPOSITION OF RICHARD JONES TAKEN IN NEW YORK CITY ON MARCH 31ST, 1925

Direct examination.

By Mr. Van Doren:

I am forty-nine years old. My business is that of marine underwriter. My place of business is No. 66 Beaver Street, New York City, my business being conducted under my own name. My business is that of marine underwriter

holding agencies for insurance companies. I am marine agent of the New Zealand Insurance Company, and I am the representative and correspondent of the National Insurance Company of Copenhagen. My experience and connection with the business of marine insurance has lasted for twenty-five years; 11 years in New York City and 14 years in the Australasian Colonies. During the whole time I have carried on the business of marine insurance. During my service in the Australasian Colonies I was an officer in the New Zealand Insurance Company, which conducted fire, marine and casualty business. For the last ten years I have been located in New York City with the exception of eight months in which I was employed in Washington by the United States Government to organize and head the Claims Division of the Bureau of War Risk Insurance. [fol. 198] That was in connection with the insurance of soldiers and sailors, what is known as the Veterans' Bureau; it was not connected with shipping. Those eight months were in 1917 and 1918. Since 1918 I have been engaged solely in marine insurance; continuously underwriting marine insurance since 1918.

I am familiar with the course and practice of marine insurance as conducted in New York City, and I know the general nature of marine insurance business as it is done in the Atlantic ports of the United States.

A paper was shown the witness and marked Plaintiffs' Exhibit "X".

(NOTE.—This is the paper offered by the plaintiffs, and admitted in evidence, Rec. p. —.)

I have seen purchase and sale contracts of goods to be shipped, imported and exported; they have come under my notice and knowledge. I have read through the paper marked Plaintiffs' Exhibit "X".

Mr. Van Doren: In the questions which I am about to address to you, Mr. Jones, you may assume, if you please, that Plaintiffs' Exhibit X of this date is an actual contract, a copy of the contract between the plaintiffs Lamborn & Company and T. S. Southgate & Company, which is involved in this action.

"Q. Please state what, of any, marine insurance T. S. Southgate & Company, the buyers mentioned in that paper, Exhibit X of this date, could effect according to course and practice of marine insurance.

"A. On the sugar itself, do you mean?

"Q. In any way at all.

"A. It seems to me from this contract that the only insurable interest which Southgate & Company would have would be some monetary emolument they might make in regard to the sale of the sugar which they are buying under this contract from Lamborn & Company.

"Q. Could the buyer, in your opinion, effect marine insurance on the sugar itself on board?

"A. He has no interest in the sugar from this contract, which reads, 'f. o. b. cars, Philadelphia, Pa.'

[fol. 199] "Q. What specie- of marine insurance, then, in your opinion, and within your experience of the costs and nature of marine insurance as practiced in this city and in other Alantic ports, could T. S. Southgate, the buyer, have effected?

"A. They could have insured their profits or their commissions.

"Q. And there is, then, here in this country a recognized right to insure contracts of that nature?

"A. Throughout the world.

"Q. Is that operative in the United States?

"A. Undoubtedly.

"Q. Have you had occasion to issue policies of marine insurance on profits under contracts of that character?

"A. Yes, sir; I have issued many of them.

"Q. Would, in such a case, the purchaser see you about the matter?

"A. Well, our business is done through licensed marine brokers. We do not in many cases, come in contract with the assured. I have insured many times for T. S. Southgate & Company. That name is quite familiar to me but I do not know them and never have seen them.

"Q. What, in your knowledge, would be the nature of such an insurance policy and how would it be effected?

"A. The broker would present to the underwriter an application calling for a fixed sum, called the 'sum insured' made up of, in this particular case, a certain price per ton on so many tons of sugar to be shipped

by steamer or steamers from Java, East Indies, August-September shipment to Philadelphia. Then the conditions of profits insurance almost invariably follow the conditions of insurance placed on the merchandise itself, the clause usually reading 'to pay the same proportion of particular average as would be paid by underwriters insuring' so many tons of merchandise 'under the following clause', and then the insurance clause would follow.

"Q. Perhaps you have a paper or so which will indicate these clauses clearly, if we call for it later?

"A. Yes, sir, I have.

"Q. Now, we are discussing the question of insurance of profits under that contract.

"A. Yes, sir.

"Q. What inquiry would be made by the broker, or by you if you were acting directly as broker, of the purchaser concerning price or on the subject matter of price?

[fol. 200] "A. The broker would have to make up his total value of insurance by a fixed price per ton of the number of tons of sugar being shipped.

"Q. In comparison with some other market rate or value?

"A. Well, he need not compare. I presume he does, but he need not present that to the underwriter. That is for the underwriter to discover himself.

"Q. How, then, would the question of insurance profits be reached?

"A. Well, it is presumed, marine insurance being a contract of good faith, that the profit declared to be insurable is one that can actually be made or one that has been contracted for.

"Q. That is to say, an existing profit based on market conditions, or, an existing profit based on a resale contract?

"A. Yes, sir; that is just exactly the point.

"Q. In the absence of a showing of such profit, either on existing market conditions or on an actual resale contract, could the purchaser be granted marine insurance on profits?

"A. I see no reason why he should not obtain insurance, if he can get it, but he has to prove his loss if a loss occurred.

"Q. In relation to what date would his profit or loss apply, to the time of taking out the policy or to the time of arrival and delivery of the goods to him?

"A. No. Profit insurance is usually written on a policy proof of interest form.

"Q. Interest at what time?

"A. At the time of the issuance of the policy or binder.

"Q. Then, the question of profits, or not, would relate back to the issuance of the policy or binder?

"A. Yes, sir.

"Q. Assume a case where the market condition was such that the profits of that sugar in this country had fallen from the purchase price contained in the contract, Plaintiffs' Exhibit X of this date, would there be any way of insuring profits then, or, would insurance be made under those conditions?

"A. Insurance would hardly be made subsequent to the sailing of that vessel.

"Q. That is to say, if market conditions were such that the profits of the commodity had greatly fallen, marine insurance on profits would not be feasible, would it?

"A. It certainly would not.

[fol. 201] "Q. Suppose, however, the purchaser, notwithstanding those market conditions, had effected a resale at a profit, then his right to insure his profit would inure?

"A. Surely.

"Q. No doubt about that, is there?

"A. I do not think there is any doubt about it, except the question of the underwriter in regard to the risk he was running.

"Q. Of course, on the sailing of vessels, you understand the difference between a shipment contract and a clearance or sailing contract, do you not?

"A. Yes, sir.

"Q. You observe, do you not, that paper Plaintiffs' Exhibit X of this date, is a shipment contract?

"A. Yes, sir.

"Q. And that the sellers do not make any covenant as to clearance or sailing?

"A. Yes, sir.

"Q. Will you, then, in light of that fact, explain more fully what you mean by conditions at the time of so-called shipment or clearance or both as effecting this insurance of profits?

"A. Marine insurance is usually placed at and from certain ports, the term 'at' having been construed by

courts to mean from the time that the goods are actually accepted by the shipping company—the carrier."

I have with me and produce a policy or binder of insurance of profits under a shipment contract. It is a binder of insurance which was actually effected. It was effected by Frank B. Hall & Co., Inc., marine insurance brokers, for Charles Kurz & Co., and the David Berg Industrial Alcohol Company, and/or all as agents. I personally bound the risk. By that I mean that I accepted the insurance and fixed the rate; I fixed the rate and bound the risk in the New Zealand Insurance Company, Ltd.

The paper produced by the witness was marked Plaintiffs' Exhibit "Y", and the following is a copy thereof:

[fol. 202] PLAINTIFFS' EXHIBIT Y.

Frank B. Hall & Co., Inc., New York

New York, December 22, 1924.

Charles Kurz & Co. et al.:

SS. "Emma Maersk"

Insurance on Anticipated Profits and/or Increased Value on about 7,150 tons of hard molasses in Baskets (full interest admitted—policy proof of interest—without benefit of salvage or right of subrogation).

Underwriters accept notice that this vessel is equipped with motors, not a steamer.

It is understood and agreed that under paragraph six (6) of the U. B. E. A. Clauses, craft and/or lightérage risk in harbors or to the vessel off shore is included at the policy rate, but that any special lighterage to loading ports is held covered at rate to be agreed.

All other terms and conditions remaining unchanged.

Provisional application dater December 18, 1924.

M. Jones.

New Zealand Insurance Co.—$10,000.

(Pencil notation:)

Cargo value @ $16.50 per ton Molasses quoted N. O. Dsct. $30 per ton.

Underwriters and Brokers Emergency Agreement Form.
(Space Reserved for Company's use.)

Cargo application. Policy No. —.
Special risk.
Certificates required. Certificate No. —.
Provisional, Definite. (Indicate by check.)
Duplicate. (Indicate by check.)

[fol. 203] Application for Insurance is hereby made by Frank B. Hall & Co., Inc., as Brokers, in name of Charles Kurz & Co. and/or The David Berg Industrial Alcohol Co., &/or The Publicker Commercial Alcohol Co., &/or all as agents, account of whom it may concern, Loss, if any, payable to them, as interest may appear or order, For the amount stated below, on (Anticipated profit and/or increased value on about 7,150 tons of hard molasses in baskets (full interest admitted—policy proof of interest—without benefit of salvage or right of subrogation).

Anticipated profits &/or increased being valued at $10 per ton Per S. S. "Emma Maersk" and conns.

To be insured lost or not lost at and from Java and/or Tjilatjap and/or Samarang and/or Soerabaja via port and/or ports in any order or rotation to Philadelphia.

Subject to printed clauses on the back hereof (unless otherwise provided hereon) and other Special Conditions as follows:

To pay the same percentage of loss on Anticipated Profits &/or Increased value as would be paid by Underwriters if insuring the hard molasses cargo on the following conditions: "Free of average under $125—unless general or the vessel or the interest be stranded, sunk, burned, on fire or in collision."

Underwriters to pay in full on such cargo as may be jettisoned and/or taken by Underwriters for salvage purposes.

Including also special additional conditions as printed on the back hereof.

Amount under deck $71,500. U. B. E. A. Clause No. 8 deleted.

Rate: — per cent.

Amount on deck & Rate: — per cent.

Brokerage: 10 per cent.

67 Wall Street, New York Dec. 18, 1924.

[fol. 204] Binding for Company

(Stamped):

War Rick Clause-Cargo Binding for applicant

This insurance also covers against war risk subject —— only

Company's clauses, also as follows:

Including the risk of mines, torpedoes, etc. bombs and Aircraft, whether hostile or otherwise.

Average payable irrespective of percentage.

General Average and Salvage charges payable according to Foreign statement or per York Antwerp Rules, if in accordance with the contract of affreightment.

Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description on the interest, vessel or voyage.

Including risk of craft, raft and/or lighter to and from the vessel. Each craft, raft and/or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

Direct or otherwise, including transhipment if any.

Binding for Company

Binding for Applicant

(On reverse side)

1. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or war-like operations, whether before or after declaration of war.

2. Warranted free of loss or damage caused by strikers, locked out workmen or persons taking part in labor disturbances or riots or civil commotions.

3. General Average and Salvage Charges payable according to Foreign Statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

[fol. 205] 4. Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage.

5. Including (subject to the terms of the Policy), all risks covered by this Policy from shippers or Manufacturers' warehouse until on board the vessel, during transshipment, if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in Policy, except that in respect to shipments to the River Plate, the risks under this insurance shall cease upon arrival at any Shed (transit or otherwise), Store, Custom House or Warehouse, or upon the expiry of ten (10) days, subsequent to landing, whichever may first occur.

6. Including risk of craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

7. Including all liberties as per contract of affreightment. The Assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the Assured and the Assurers is hereby admitted.

[8. Warranted not to cover the interest of any partnership, corporation, association or person, insurance for whose account would be contrary to the Trading with the Enemy Acts or other statutes or prohibitions of the United States and/or British Governments.]*

Annex to Exhibit Y

U B

E A
1918

1. This insurance covers via any routes, direct or other-
[fol. 206] wise, including risk of transshipment, if any, and lighterage whether customary or otherwise.

2. Held covered at an additional premium, if required, in the event of the goods (or any part thereof) hereby in-

[*Matter enclosed in brackets erased in copy.]

sured, being shut out or transferred to other vessel or vessels. In the event of the goods or any part thereof, being discharged short of or carried beyond destination, the Assurers hereby agree to hold the Assured covered at an additional premium, if required, until final arrival of goods at their proper destination and delivery as herein provided.

3. The risks covered by this policy are to include loss, damage, or expense, resulting from explosion, howsoever or wheresoever occurring, even though the insurance be otherwise F. P. A., but it is especially understood and agreed that the above wording is not intended to cover the risks of war, riot or civil commotion, submarines or floating mines, or to in any way prejudice the printed wording of the policy excluding risks of this nature.

4. Goods insured hereunder, while on land conveyances and/or while on docks, wharves, quays or elsewhere on shore, are also covered, irrespective of the terms of average, against loss, damage or expense caused by fire, lightning, floods, rising waters, collision and/or derailment and/or overturning of the conveyance, collapse and/or subsidence of docks, wharves, quays or bridges.

5. Underwriters, irrespective of the terms of average, are to pay the insured value of any package or packages which may be totally lost in loading, transshipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress; also to pay landing, warehousing, forwarding and special charges, if incurred.

There is attached to this paper the original binder describing the vessel as the "S. S. Emma Maersk", which was [fol. 207] incorrect, and the endorsement bears a clause:

"Underwriters accept notice that this vessel is equipped with motors, not a steamer,"

and then extends the other clauses in the insurance, which appear on the face of the paper.

Plaintiffs' Exhibit "Y" is a printed form in general use in marine insurance of this character that we are discuss-

ing; it has been in general use since before I was born; it has been in general use since I have been in the marine insurance business, with one exception; that exception is some printing on the back of the form which has been amended from time to time.

"Q. Would the right of T. S. Southgate & Company, if it existed under the conditions of market or of the resale contract and under the contract, Plaintiff's Exhibit X of this date, be affected by the name of any particular steamer.

"A. It could be bound provisionally by 'steamer or steamers' as the contract called.

"Q. In other words, am I to understand that the policy of binder would in that respect follow the language of the contract and say 'steamer or steamers'?

"A. Yes, sir with this small exception; some underwriters would bind that 'approved steamer or steamers' and fix their rate. Other underwriters would permit 'steamer or steamers' to be used, and then in the space for 'rate' would put 'approved steamers,' so much per cent. Personally, I always use the form 'approved steamer or steamers,' and not contract myself to take some steamer that might not be approved, even at a high rate.

"Q. Just exactly what is meant by an approved steamer?

"A. The approved steamer definition is for trans-Atlantic voyages—

"Q. Take voyages from the Far East.

"A. Not less than 1,500 tons, not over 15 years of age, Class 100 A-1 at Lloyds, or equivalent.

"Q. Of course, you have lists of such steamers?

"A. Lloyds Register, yes.

"Q. With the use of such phrases as you have stated it would not be essential in taking out insurance on profits [fol. 208] to give the name of the steamer?

"A. Not until the closing particulars were handed in.

"Q. When would that be required?

"A. As soon as known to the assured.

"Q. Would you make any inquiry at all concerning the ocean bill of lading covering the goods themselves to the vendors?

"A. The ocean bill of lading is practically uniform, and unless some particular risk were asked to be covered, the bill of lading would not be called for. I might explain that

by saying, in the loading of some very heavy material which in the opinion of the underwriter might be too much for the derricks on the vessel, we might ask for a bill of lading, in order to see whether the shipping company or carrier had exempted himself from liability for the loading of that particular interest. I have that in mind, because I have just taken insurance today on that very thing, where a pleasure launch was loaded on the deck of a vessel and I demanded the bill of lading before I would insure from the water to the water.

"Q. In order to see, simply, whether the carrier had exempted himself from liability from all damage to the launch?

"A. Yes.

"Q. That would not relate, would it, to sugar in bags?

"A. No, sir.

"Q. Would not the fact that the sugar which Lamborn & Company intended to deliver to T. S. Southgate & Company in accordance with the paper marked Plaintiffs' Exhibit X for identification of this date had been loaded on board a steamer under a bill of lading reading 'Port Said option New York,' impair or affect in any manner the right of the purchaser so to insure his profits?

"A. No, sir.

"Q. Would the fact that the said steamer carrying the sugars out of which Lamborn & Company were to make delivery to the purchaser under the paper marked Plaintiffs' Exhibit X of this date, while off the cost of New Jersey, on the Atlantic, had been diverted from New York to Philadelphia and caused to enter Philadelphia, would that in any manner affect or impair in the slightest degree the insurance which might have been effected by the purchaser of his profits under his contract?

"A. It would not impair the insurance. It might affect it in regard to the rate, deviation being held covered under [fol. 209] the standard form of policy at a rate to be fixed by the underwriter.

"Q. So that there is a provision, is there not, in the standard form of insurance binder insuring profits under such a contract for the very incident of diversion?

"A. Certainly.

"Q. That is, it is provided for?

"A. Certainly, no commerce could succeed without it.

"Q. It is provided for by the contract of insurance itself?

"A. Yes, sir.

"Q. Would the fact, that after the seller, in this case Lamborn & Company, had declared a certain steamer to the purchaser as carrying sugar and thereafter substituted by redeclaration another steamer, affect or impair the purchaser's insurance of his profits?

"A. Provided the substituted steamer came within the approved classification and there had been no known reported loss to that steamer, there would be no objection.

"Q. You mean, do you not, that such redeclaration of such substituted steamer would of course, have to be effected and made before any loss of the steamer so redeclared?

"A. Yes, sir. It is customary, where a change of steamer name is brought in to the underwriter and the records as to that steamer are not clear, that a warranty is placed on the policy or binder 'Warranted not known or reported loss.'

"Q. And that protects the insured under the new declared steamer?

"A. Yes, sir.

"Q. Leaving his insurance contract intact?

"A. Yes, sir.

"Q. And unimpaired?

"A. Yes, sir.

"Q. Is there a clause, or, are there clauses, in the binder, Plaintiffs' Exhibit Y for identification of this date, which, in terms, relate to deviation of steamer or change of steamer?

"A. Yes, sir.

"Q. Would you mind, please, calling attention to those clauses on the record?

"A. It is clause No. 4 of the B. U. E. A. Clauses, reading 'Held covered at a premium to be arranged in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage.'

"Q. Please tell us what those letters U. B. E. A. mean?

"A. They stand for the words 'Underwriters and Brokers Emergency Agreement, 1918, adopted by the Board of Underwriters of New York, following the London

[fol. 210] Institute Cargo clauses, 'which have been in effect for a great number of years.

"Q. Have those clauses which you have referred to by those initials 'U. B. E. A.' been in effect uninterruptedly in New York and in American ports on the Atlantic since 1918?

"A. Yes, sir; and for years before that but with the designation 'London Institute clauses,' which was probably considered not patriotic and so they used their own.

"Q. Is there a clause on one or the other of those papers, which constitute Plaintiffs' Exhibit Y for identification of this date, which, in terms applies specifically to deviation of the steamer?

"A. That clause that I have just quoted certainly applies to deviation.

"Q. Do you happen to know the rating of the steamer 'West Cheswald'?

"A. Yes, sir; she is a Shipping Board vessel of something over 3,000 tons, and was last year classed 100 A-1 at Lloyds.

"Q. Was she classed, if you know, in the summer and fall of 1920?

"A. Yes, sir.

"Q. Would she come within the classification of approved vessels?

"A. Yes, sir.

"Q. Would she come within that classification in the summer and fall or autumn of 1920?

"A. Yes, sir.

"Q. Please state, then, whether, in the practice and course of marine insurance, as you know it, whether the fact that after declaring the steamer, the Japanese steamer 'Chifuku Maru' to T. S. Southgate & Company, Lamborn & Company, following a delay to that ship, declared the 'West Cheswald' to T. S. Southgate & Company, would that have affected or impaired to any degree any insurance which T. S. Southgate & Company might have effected under that contract?

"A. No, sir, subject, of course, to the proviso that no known or reported loss had occurred to the substituted vessel.

"Q. Would the fact that the sugar laden on board the West Cheswald at the Island of Java in September, 1920, were put on board and covered by an ocean bill of lading reading 'Port Said option New York' had impaired or affected such insurance rights or the insurance of T. S. Southgate & Company?

"A. You mean insurance insuring something that was to be delivered in Philadelphia?

"Q. Yes, sir.

"A. No, sir, because the vessel could bring the sugar to [fol. 211] New York and it could then be transferred or transshipped to Philadelphia.

"Q. Then, such transfer or transshipment from New York to Philadelphia would not have affected the insurance?

"A. No, certainly not; it is held covered, of course.

"Q. Would the fact that the West Cheswald, as she neared the American coast and while two or three days off, had been diverted by wireless on the high seas and caused to come into Philadelphia with her cargo of sugar consigned to Lamborn & Company, have impaired and interfered with the right of T. S. Southgate & Company under any insurance they could have taken out with their contract with Lamborn & Company, called Plaintiffs' Exhibit X of this date?

"A. None whatever.

"Q. In the course and practice of marine insurance, have you known of change of steamers to be effected by the insured?

"A. Yes, very frequently.

"Q. Would you say that was a frequent or infrequent occurrence?

"A. I should say it was fairly frequent.

"Q. Is any objection made to continue the insurance in case of change of name of steamers?

"A. Not unless the changed vessel is one that an underwriter would not accept.

"Q. It depends on the vessel being within the approved class?

"A. Yes, sir.

"Q. So that, assuming that a purchaser in the position of T. S. Southgate & Company having a contract with Lamborn & Company such as the paper marked Plaintiffs' Ex-

hibit X for identification of this date, received notice from the vendors of substitution of the steamer, would he have anything more to do than to report the name of the new steamer to the underwriters?

"A. That would be sufficient.

"—. And, is it a fact, then, that the insurance, assuming the steamer to be in the approved class, would continue as valid as before?

"A. Yes, sir.

Cross-examination.

By Mr. Taylor:

"Q. I believe that you testified that, under a contract similar to the one existing between T. S. Southgate & Company and Lamborn & Company, providing for the shipment [fol. 212] of 1,000 bags of White Java sugar f. o. b. cars, Philadelphia, Pa., landed weights, shipment to be made during August/September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pennsylvania, the buyer under that contract, had an insurable interest; is that correct, sir?

"A. It is possible for him to have an insurable interest.

"Q. When would that insurable interest attach?

"A. As soon as he signs the contract to buy that sugar.

"Q. The interest, then, would attach prior to the delivery of goods, f. o. b. cars at Philadelphia, Pennsylvania?

"A. Your question is not quite clear, from an underwriting point of view. You speak of 'interest.' There can be several interests on this particular shipment of sugar. The sugar itself is one interest. Lamborn & Company had an interest in the sugar. I did say that it was possible for Southgate & Company, under this contract, to have an interest, which would be commissions that they might earn, profits, as was suggested, or any other emoluments that might come to them from the sale of the sugar which they had contracted to purchase. Southgate & Company could not insure that sugar, because, in that case, there would probably be double insurance, Lamborn & Company being the owners of the sugar no doubt, had it covered by marine insurance.

"Q. But Southgate & Company could insure the profits to be derived from the sale of that sugar?

"A. Certainly, yes.

"Q. And, how soon could they insure the profits to be derived from the sale of that sugar with a marine underwriter under the terms of this contract?

"A. Well, as I said before, any time after they purchased that sugar on which they had a problematical profit.

"Q. Would they have that right to insure profits when the sugar was loaded on the steamer at Java?

"A. Yes, sir, if that is when their profit occurred, surely.

"Q. Suppose Southgate & Company had insured their profits on the sugar to be purchased by them under the contract requiring 1,000 bags of white Java sugar, f. o. b. cars, Philadelphia, Pennsylvania, landed weights, shipment to be made during August/September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pennsylvania, that contract of insurance would have covered a shipment of sugar meeting the requirements of [fol. 213] that contract, and none other, would it not?

"A. Yes, sir.

"Q. You have mentioned something about approved steamers in the particular contracts of insurance which you negotiate?

"A. Yes.

"Q. That is a precaution taken by you for your own protection is it not?

"A. It is a precaution taken by all underwriters, yes.

"Q. Is it not possible to make other changes in a contract of insurance?

"A. There are various changes that can be made in a contract of insurance.

"Q. So, there is no standard form; that remains as between the parties as to what the requirements shall be?

"A. Only the conditions of insurance are the standard form.

"Q. In the discussion of the marine insurance policy, I believe you stated that that form was taken from the English form of insurance?

"A. I said that these particular conditions known as the U. B. E. A. conditions were taken from the London Institute Cargo clauses, an English form.

"Q. Isn't it true that marine insurance and rules of shipping are largely derived from the English practice?

"A. Yes, sir.

"Q. That is, the forms and customs?

"A. Yes, sir.

"Q. You were asked a question with reference to the subsequent declaration of another steamship to T. S. Southgate and T. S. Southgate & Company were notified of the subsequent declaration of this steamer, the West Cheswald, and I believe you stated that such subsequent declaration would not impair the rights of T. S. Southgate & Company?

"A. Yes, sir.

"Q. That is true, provided the terms of the contract between T. S. Southgate & Company and Lamborn & Company were complied with in every particular, is it not?

"A. The marine underwriter is not interested in the terms of the contract. All he is interested in is the interest of Southgate & Company in that particular shipment or that particular interest, as we call it, or merchandise.

"Q. In view of that, Southgate & Company would have no interest in any other shipments of sugar, except that which met the requirments of the contract in question?

"A. I cannot answer that. I do not know anything about the business arrangement with regard to the de-[fol. 214] livery of the sugar. If an assured, or an assured's broker presents a risk to us, there is an implied warranty that he has an interest in that risk. If he has not an interest in that risk his policy of insurance is void. That is one of the implied warranties that govern the whole business of marine insurance.

"Q. And, therefore, any change of interest on the part of the insured would invalidate the policy of insurance as between the marine underwriter and the assured?

"A. Not so long as it is notified to the insurance company and indorsed on the policy.

"Q. And that change is accepted by the underwriters?

"A. Yes.

"Q. You have likewise testified to several policies of insurance, under which the names of vessels have been

changed from time to time, or, the vessels themselves have been changed?

"A. The carrying vessel is changed?

"Q. Yes.

"A. That is quite frequently done.

"Q. But you do not recall the contract the assured may have had with the shipping company or with the vendor of the cargoes contained on those very ships?

"A. We are not interested in that at all; we never call for it. I can probably clear up that last question, if you wish.

"Q. Yes, go ahead.

"A. Losses are settled according to a very old established custom, known among underwriters as the 'usages of Lloyds,' and all policies on cargo insurance contain a clause requiring losses to be presented according to those usages. Lloyds usages require, in support of a claim, the invoice of the goods to establish ownership, the bill of lading to establish their shipment by a certain vessel, the Master's protest to establish a peril of the sea, which is covered under the policy, and a final survey to establish the measure of damage. Those are the usual papers required in the ordinary marine disaster, and, of course, we, therefore, accept an application for insurance in the belief that the assured has an actual interest in those goods, which he is prepared to prove by the production of his invoice and bill of lading, if he claims a loss."

Redirect examination.

By Mr. Van Doren:

"Q. That last answer is one where you were speaking [fol. 215] of marine insurance by the owner of the goods?

"A. Yes, sir. I made that explanation because the questions asked by counsel seemed to me to suggest that the underwriter should know all about the contract of sale and purchase between the shipper and the consignee.

"Q. And, as to that matter, what is the practice of the marine insurance business?

"A. We are not interested in the contract of purchase. We are only interested in the ownership of the goods, which has to be proved by the proper certified invoice.

"Q. You speak of cases where the ownership is the subject matter of the insurance?

"A. Yes, sir.

"Q. Where the ownership of the goods is not the subject matter of the insurance by profits by a prospective purchaser under goods to be delivered at an American port, then, that purchaser likewise, in making a counterclaim under his contract of insurance, will have to establish his interest in profits and in the loss of the goods, as bearing on that; is that a fact?

"A. With one variation. The profits, or anticipated profits, as they are called in insurance, are customarily insured policy proof of interest.

"Q. Called a 'P. P. I.' policy?

"A. A 'P. P. I. policy. This is a custom that has crept in for the very reason explained previously, that the owner of the goods themselves is the man who owns and controls the invoice and the bill of lading. The insurer of the profits with a perfectly good insurable interest would, therefore, be precluded in case of a loss from producing those papers that are necessary under the ordinary merchandise insurance.

"Q. That would have to be produced by the owner of the goods to collect his insurance?

"A. Yes, sir. In this particular case, had one of those vessels gone down, containing that particular sugar, Lamborn & Company, I presume the owners of the sugar, would have produced the papers for the collection of the value of that sugar as shipped by them. Southgate & Company could only have produced a policy insuring anticipated profits.

"Q. And their contract?

"A. And their contract, to show that they had done that, that they were the prospective owners of that sugar and that policy would have been accepted as proof of interest.

"Q. In other words, you have drawn a distinction between marine insurance, where the owner of the goods [fol. 216] might trade against perils of the sea, and insurance by a purchaser, under a contract for delivery yet to be made to him, of prospective profits on that contract?

"A. There is a distinction in the method of adjusting the losses.

"Q. Are they not clear and distinct subject matters?

"A. Yes, sir.

"Q. Of insurance?

"A. Yes, sir.

"Q. Now, these forms about which counsel inquired, are they peculiar to your business, or, are they in common and general use?

"A. Which forms do you mean?

"Q. I refer specifically to the papers marked Plaintiff's Exhibit Y for identification of this date.

"A. Oh, they are in common use.

"Q. At all American ports on the Atlantic?

"A. Yes, sir.

"Q. And, have they been in use at least continuously since 1920?

"A. Yes, sir.

"Q. Is there very much taking out of insurance on profits in this country, Mr. Jones, by purchasers situated as Southgate & Company are, under that contract, which is marked Plaintiffs' Exhibit X for identification of this date?

"A. Yes, sir; there is quite a considerable amount of it done in rubber, coffee and molasses from the Far East, a little done on olive oil and Italian products.

"Q. I mean, insuring profits by the purchaser.

"A. Yes, on long trips, where the market is likely to fluctuate quite considerably between the time of shipment of the goods and the arrival here the contracts for sale are made while the vessel is on the voyage and the profits insurance is taken out to cover anticipated profits, sometimes before the sailing of the vessel and sometimes when the vessel has almost reached the port of destination.

"Q. At various stages of the adventure?

"A. Yes, sir.

"Q. But, is it not a fact, that the purchaser may so insure the profits inuring to him upon his entering into, signing and delivering the contract?

"A. Yes, sir.

"Q. Let me make that question a little clearer to you. Is it a fact, then, that the purchaser may apply for and obtain his insurance upon profits as soon as he has a contract signed by both parties?

[fol. 217] "A. If that contract gives him an interest in that venture, he can insure that interest.

"Q. And proof of that interest he has to make, in the event of loss?

"A. Yes.

"Q. You would assume his interest from the contract, would you not?

"A. We would assume his interest from the contract and issue him a policy proof of it.

"Q. Leaving him to prove his interest in the event of its loss?

"A. He would not have to prove any further interest than the production of the policy, unless he had voided the insurance.

"Q. Could he take out such interest even before loading?

"A. Yes, sir.

"Q. Or at any time after loading before the arrival of the vessel?

"A. Yes, sir.

"Q. That is to say, the vessel being not lost?

"A. Yes, sir.

"Q. So that, any purchaser under a contract of that character, can insure his profits, may he?

"A. Yes, sir.

"Q. And such insurance is not impaired by either diverging or by substitution of or redeclaration of carrying steamer?

"A. It is not violated by that either, only as regards rate.

"Q. What circumstances would affect the rate by divergence?

"A. An increase hazard is what the underwriter charges for. It would be hardly fair to say that increased distance might cause an additional rate to be charged, because, by increasing the distance, you might avoid some known hazard. The entrance to an extra port is a hazard we usually charge for, if not in the direct line of the voyage.

"Q. Would a change of destination from New York to Philadelphia while the vessel was 40 to 60 miles off the New Jersey coast be one which would increase rates?

"A. A vessel coming through the Mediterranean?

"Q. Yes.

"A. No, sir; that would probably be to the advantage of the underwriter.

"Q. On the subject matter included with the redeclaration of a steamer, the employing of a new steamer from which the cargo was delivered, what circumstances there would increase the rate charged by the underwriter?

"A. A vessel of somewhat inferior class or a vessel by some different route are two that I can think of right offhand.

"Q. Were any of those circumstances thus increasing [fol. 218] the rate incident to the substitution of the West Cheswald or her diversion from New York to Philadelphia?

"A. I cannot tell you that now, sir.

"Q. What would you have to examine to tell that?

"A. I would have to examine the movement of those vessels at that particular time. I have compared the two vessels. They are of similar class, one no inferior to the other, except, probably for Japanese ownership, which is inferior to a Shipping Board owned vessel, they are about the same size, they are well within the age limit but I do not know what particular course they took.

"Q. Assume that they both took a course from Java, through the Indian Ocean and through the Red Sea, then through the Canal into the Mediterranean, and across the Atlantic by way of the Straits of Gibraltar, one coming to Philadelphia and one to New York and diverted, as I have said, to Philadelphia, would not these voyages be practically identical?

"A. Yes, sir.

"Q. Would the courses and nature of those voyages be circumstances tending to inc-ease the rates of insurance?

"A. Presuming that the ports of call——

"Q. Assuming that they made the same ports of call and that for coaling.

"A. Then, there would be no difference.

"Q. In fact, Mr. Jones, is it not true that the substitution of a steamer a short distance off the coast for a steamer having met with an accident and tied up at Port Said would have been a change which the underwriters would have welcomed?

"A. I am to understand that at the time that one steamer was at Port Said and the other was almost to this coast?

"Q. Yes.

"A. Yes. Of course, that was a change that would be to the advantage of the underwriter and that is what I meant by not being so definite without knowing the movements of the vessel how the rate would be effected. Had the vessel close to the coast of the United States been the one to break down and then go into Bermuda and then we were notified that the tramp was coming and another boat following, there would be an addition to the rate.

"Q. Assume the change was this. That the newly declared steamer was close to the American shore, while the formerly declared steamer was delayed by an accident to machinery at Port Said, would not the underwriter have [fol. 219] been glad to take the newly declared steamer?

"A. Certainly.

"Q. It would have minimized the underwriter's risk, would it not?

"A. Yes, sir.

Mr. Van Doren: That is all.

Recross-examination.

By Mr. Taylor:

"Q. When ascertaining the insurable interests that the buyer of a lot of sugar might have, would you not have to see the contract of purchase between them?

"A. No, sir. The declaration by the firm or by the assured as to the price of his sugar would be sufficient to satisfy an underwriter, because, if that declaration is not absolutely true, he voids his insurance.

"Q. And the proof of interest would be required in *in* the event of loss and not until that time.

"A. Well, as I explained before, in this country, the policy is accepted as the proof of interest. It would only be in case of suspicion of fraud that we might then go further than that. In England, however, he has to actually prove his interest.

"Q. You have also stated that the rate of insurance might be increased, dependent upon the number of ports at which a vessel carrying the cargo in question would stop during the voyage?

"A. Well, the deviation to ports. All vessels, tramp vessels of that nature, are 'via port or ports,' that meaning port or ports in the line of voyage.

"Q. Naturally, at the time the insurance was taken out, you would have to know such deviations or intended deviations so as to be able to fix the rate of insurance?

"A. No, we fix the rate as a direct voyage and we follow the vessel and see what deviation she has made and charge for it on arrival of the vessel or on the final closing."

Given under my hand this 26th day of September, 1925.

D. Lawrence Groner, U. S. D. J.

[fol. 220] In United States District Court

Assignments of Error—Filed August 27, 1925

The plaintiffs in this action, in connection with their petition for a writ of error, assign the following errors and aver that the Court erred in the following particulars:

1

In striking out from the plaintiffs' amended notice of motion for judgment certain portions of the allegations thereof, to-wit:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia,

and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the time herein mentioned there existed a well-known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.,' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or [fol. 221] steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

2

In excluding the testimony of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker, as set forth in the plaintiffs' Certificate of Exceptions No. 2.

3

In excluding testimony as to the meaning of the following expression in the letter of credit and purchase and sales contract, as used and understood among importers and buyers and sellers of imported sugars and as established by a well-known long established and generally recognized custom: "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

4

In excluding the testimony of Richard Jones and the Exhibits therewith, as set forth in plaintiffs' Certificate of Exceptions No. 3.

5

In excluding testimony tending to show that the purchasers under the contract in question had no right of insurance in the goods, that the buyers' only right of insurance was with respect to the profits arising under the contract of purchase and sale, and that such right of insurance was not affected by substitution of steamers, the diversion of the "West Cheswald" while on the high seas, or the form of ocean bill of lading covering the sugar owned by Lamborn & Company on the "West Cheswald."

[fol. 222]

6

In excluding testimony with respect to the general custom and practice as to marine insurance in connection with contracts in form similar to the contract of purchase and sale dated April 23, 1920, between the plaintiffs and T. S. Southgate & Co.

7

In holding that the plaintiffs failed to make shipment from Java to Philadelphia; that the shipment made by Lamborn & Company on the S. S. "West Cheswald" was not a shipment from Java to Philadelphia; that Lamborn & Company's shipment of sugar on the S. S. "West Cheswald" under a bill of lading reading "destination Port Said, option New York," which sugar was carried by the S. S. "West Cheswald" to Philadelphia as her first American port of call, was not a shipment from Java to Philadelphia; that to comply with the contract the S. S. "West Cheswald" must at the time of lading at Java have been destined for Philadelphia.

8

In holding that the plaintiffs failed to comply with the provisions of the letter of credit in suit.

9

In failing to hold that the defendant based its refusal to pay the draft upon the ground of substitution of steamers and that the defendant was bound by the position so taken.

10

In holding that the defendant might assert in its defense grounds other than that of substitution of steamers, to-wit, an alleged failure to comply with the shipment provisions of the letter of credit.

11

In failing to hold that the defendant was estopped to [fol. 223] assert any other defense than that of substitution of steamers.

12

In permitting the Bank to assert and rely on Lamborn & Company's alleged failure to comply with the contract of purchase and sale between Lamborn & Company and T. S. Southgate & Co.

13

In granting the defendant's motion upon the conclusion of the introduction of the plaintiffs' evidence to direct a verdict in favor of the defendant, and in directing such a verdict.

14

In entering judgment for the defendant upon the verdict of the jury.

15

In that the judgment was contrary to law.

16

In that the judgment was contrary to the evidence.

In that the judgment was not sustained by the evidence.

Wherefore, the plaintiffs pray that the judgment of the District Court may be reversed and the verdict of the jury set aside and a new trial granted.

Baird, White & Lanning, Counsel for Lamborn & Company.

[fol. 224] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed August 24, 1925

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

ARTHUR H. LAMBORN et al., Surviving Partners of the Co-partnership firm of Lamborn & Company, Plaintiffs,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, Defendant

It is Stipulated between counsel for the parties that the foregoing is a true and complete transcript of the record in this cause so far as the parties deem same necessary and material to print; that the Clerk of this Court may transmit the same to the Clerk of the Circuit Court of Appeals for the 4th Circuit at Richmond, Virginia, where it shall be printed under the supervision of the Clerk of that Court in accordance with Rule 23, and that all original exhibits shall be certified up to the Circuit Court of Appeals by the Judge of this Court as original papers to be used by either party in argument of this case.

Baird, White & Lanning, Counsel for Lamborn & Company. Tazewell Taylor, Counsel for the National Bank of Commerce of Norfolk.

In United States District Court

Memorandum of Original Papers Accompanying Transcript of the Record

(1) Petition for writ of error.
(2) Order allowing writ of error.
(3) Writ of Error.
(4) Citation, service accepted.

[fols. 225 & 226] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 227] In the United States Circuit Court of Appeals for the Fourth Circuit

No. 2452

Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchings, Clarence C. Troup, Karl E. Lindgren, George H. Logan, N. Nelson Keen, and B. Wheeler Dyer, Surviving Partners of the Copartnership Firm of Lamborn & Company, Plaintiffs in Error,

versus

The National Bank of Commerce of Norfolk, Virginia, a National Banking Association or Corporation Created by and under the Acts of Congress of the United States, Defendant in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

Minute Entries

October 2, 1925, the transcript of record is filed and the case docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Edward R. Baird, Jr., Louis O. Van Doren and H. G. Connor, Jr., is entered for the plaintiffs in error.

October 5, 1925, the appearance of Tazewell Taylor is entered for the defendant in error.

[fol. 228] November 3, 1925, twenty-five copies of the printed record are filed.

December 15, 1925, stipulation of attorneys as to the time for the filing of their respective briefs filed.

December 17, 1925, original exhibits (documents) are certified up.

Argument and submission January 25, 1926, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

[fol. 229] In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued January 25, 1926. Decided October 19, 1926)

Before Waddill, Rose and Parker, Circuit Judges

Louis O. Van Doren (Baird, White & Lanning; Edward R. Baird, Jr.; H. G. Connor, Jr., and Van Doren, Conklin & McNevin on brief) for Plaintiffs in Error, and Tazewell Taylor for Defendant in Error.

OPINION—Filed October 19, 1926

ROSE, Circuit Judge:

This is the second time this case has been here. What has been said (2F) (2d) (23) need not be repeated.

At the new trial the learned District Judge thought that the plaintiffs had offered no admissible testimony strengthening the case once held insufficient and he directed a verdict for the defendant.

The plaintiffs assign seventeen errors which resolve themselves into three contentions.

Alleged Waiver by the Defendant

The plaintiffs say that defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The [fol. 230] claim of the plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while plaintiffs insist that defendant may not amend or supplement its out of Court statement of its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the plaintiffs treated the defense in question as properly before the Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made.

Evidence as to Custom of Trade

After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to

one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things:

"The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a cause in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded [fol. 231] what the parties themselves meant and intended by the contract and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, does not require the aid of custom to interpret it and would therefore have to be overruled and refused admission on that account."

We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question.

Evidence as to Underwriting Practice

The refusal of the Court to receive proffered evidence as to underwriting practices is not open to attack here.

That testimony did not bear upon any issue in the case, except in the most remote way. It was at best directed to a purely collateral matter. Its exclusion could not have prejudiced the plaintiffs and was well within the discretion of the trial Judge.

Affirmed.

[fol. 232] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Eastern District of Virginia

Judgment—Filed October 25, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John C. Rose, U. S. Circuit Judge.

October 25, 1926.

[fol. 233] In United States Circuit Court of Appeals

Minute Entries

On another day, to-wit, November 26, 1926, the mandate of this Court in this cause is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original petition for writ of error and order allowing writ of error are returned to the Clerk of the District Court at Norfolk, Va.

Same day, the original exhibits (documents) are returned to the Clerk of the District Court at Norfolk, Va.

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The said decision and judgment of the said United States Circuit Court of Appeals of the Fourth Circuit has erroneously decided an important question of general law affecting the entire subject matter of purchase and sale contracts and shipments f.o.b. named place or port of destination, and that said decision and judgment is not only untenable but is in conflict with the weight of authority on the subject matter rendered by the courts in the United States and England 16

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EXHIBIT "B."—Opinion of the Circuit Court of Appeals, Second Circuit, in the case of Matthew Smith Tea, Coffee & Grocery Company *v.* Arthur H. Lamborn, *et al.* (and two other cases decided simultaneously therewith), reported 10 Fed., 2nd, 697 50

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IN THE

Supreme Court of the United States

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, surviving partners of the copartnership of LAMBORN & COMPANY,
Petitioners,
(Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States,
Respondent,
(Defendant Below).

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchings, Clarence G. Troup, Karl E. Lindgren, George H. Logan, N. Nelson Keen and B. Wheeler Dyer, for their petition herein respectfully show to this Honorable Court as follows:

I.

Pursuant to Section 5, Subdivision (b) of Rule XXXV of this Honorable Court, your petitioners respectfully apply for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, rendered in the above entitled action on October 25th, 1926 (which decision and judgment followed and applied the decision of the said Court rendered herein on October 21st, 1924, reported 2 Fed. [2], 23), upon the following grounds:

(a) That the said decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the cases of

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn,*
Pennsylvania Milk Products Co. v. *Lamborn,*
L. Brenner Sons & Perloff v. *Lamborn,*

rendered on the 8th day of February, 1926, and reported in 10 Fed. (2d), 697, on the same subject matter, to wit: Identical shipment clauses contained in certain contracts and letters of credit to which your petitioners were parties, and arising in foreign and domestic commerce, as more specifically set forth and shown below herein.

(b) That the said decision of the United States Circuit Court of Appeals, Fourth Circuit, has decided an important question of local law arising in the States of New York, Pennsylvania and elsewhere in the United States, and that its said decision

is in conflict with decisions of the Supreme Court of the State of New York and of the Supreme Court of the State of Pennsylvania and certain other jurisdictions on the same subject matter, to wit: the said shipment clause in said contracts and letters of credit to which your petitioners were parties, as more specifically is set forth and shown below herein.

(c) That the said decision and judgment of the United States Circuit Court of Appeals of the Fourth Circuit has erroneously decided an important question of general law affecting the entire subject matter of purchase and sale contracts and shipments f. o. b. named place or port of destination, and that said decision and judgment is not only untenable but is in conflict with the weight of authority on the subject matter rendered by courts in the United States and England, as more specifically set forth and shown below herein.

II.

The decision and judgment sought to be reviewed is in direct conflict with certain decisions on the same matter rendered by the United States Circuit Court of Appeals, Second Circuit.

That in order to show to this Court that the said conflict of decision between said Circuit Court of Appeals has arisen on the same shipment clause, identical in phraseology, your petitioners beg leave to proceed with a brief description of the litigations above noted, taking up the three cases in the Second Circuit at the outset.

both because those cases set forth basic facts common to those three cases and to the case at bar and also because the three cases in the Second Circuit originated prior to the cause decided in the Fourth Circuit and because the decision and judgment of the United States Circuit Court of Appeals, Second Circuit, in said three causes was rendered and filed before the decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit, to review which this writ of certiorari is prayed for.

That the three causes

> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn,*
> *L. Brenner Sons & Perloff* v. *Lamborn,*
> *Pennsylvania Milk Products Co.* v. *Lamborn,*

were actions at law brought against your petitioners by the purchasers of large quantities of sugar to recover the amount collected by your petitioners out of letters of credit posted by said purchasers to pay for the goods which your petitioners had contracted to ship from Java and to deliver to the purchasers at the Port of Philadelphia, U. S. A.

That in each of said cases the same form of printed or written contract had been entered into between your petitioners and said purchasers varying only as to quantity of merchandise, and in each of said contracts the shipment clauses were exactly alike, to wit:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

That in performance of said contracts your petitioners delivered to each of said purchasers its quantity of Java

sugar at the Port of Philadelphia from and out of the S. S. *West Cheswald;* and, drawing drafts, collected the contract price out of the letters of credit in each case as follows: *Matthew Smith Tea, Coffee & Grocery Co.* $144,283.83; *L. Brenner Sons & Perloff* $53,123.84; *Pennsylvania Milk Products Co.* $132,307.25.

That the facts in regard to the S. S. *West Cheswald* were as follows: Shipment of said Java White Sugar was effected on said steamship in the contract period of shipment, *i. e.,* August and/or September, 1920, at a Java port under a bill of lading which read as follows:

> "Steamship *West Cheswald,* port of discharge, New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York."

That your petitioners at that period of time were importing Java Sugar to American ports on a fleet of about twenty steamers, which were not owned or controlled by your petitioners, and were declaring steamers to purchasers and re-declaring them as accident, casualty, or other exigency of the business induced or required your petitioners so to do.

That at or about the time of the departure of the *West Cheswald* from Java, another ship, the S. S. *Chifuku Maru* also carrying a shipment of Java White Sugar consigned to your petitioners, had been declared to the said above mentioned three plaintiffs; but in the course of her voyage the *Chifuku Maru* met with an accident and was detained at Port Said, Egypt; so that it became necessary for your petitioners to employ the cargo carried by the S. S. *West Cheswald* in order to make deliveries within the lifetime of existing letters of credit.

That the S. S. *West Cheswald* at that time bound for New York, when about three days off the Atlantic Coast, was intercepted by your petitioners after due application to and consent by the United States Shipping Board, and caused to proceed at once to Philadelphia, where she arrived on December 15th, 1920; and from said ship deliveries of the purchased quantity of the sugar were made as above stated to the purchasers, plaintiffs in said three actions which we are describing.

The *Chifuku Maru* arrived at Philadelphia on February 4th, 1921.

That about March-April, 1921, the said three purchasers commenced in the United States District Court for the Southern District of New York the said three actions at law against your petitioners to recover back said amounts collected by your petitioners as above set forth, and that the principal ground for said recovery claimed by said plaintiffs, purchasers, was that your petitioners had no right to substitute the S. S. *West Cheswald* for the S. S. *Chifuku Maru* and that your petitioners' delivery and attempted delivery of Java Sugar from the S. S. *West Cheswald* was in violation of the shipment clause of the contract between your petitioners and said plaintiffs, purchasers; and subsequently in the course of said litigation the said plaintiffs also urged upon the United States Circuit Court of Appeals, Second Circuit, the nature of the bill of lading of the S. S. *West Cheswald,* the phraseology as to her first port of arrival and her diversion on the high seas to the port of Philadelphia, using in support of said contention the decision of the United States Circuit Court of Appeals, Fourth Circuit, reported in 2 Fed. (2d), 23, above referred to, and that on a motion for a judgment made by the plaintiffs in the form of a motion to

strike out your petitioners' answers, District Judge LEARNED HAND rendered on July 18th, 1921, a decision denying the plaintiffs' said motion, which is found reported in 276 Fed., 325, and a copy of which opinion is hereunto annexed and marked Exhibit "A."

That when the said causes came on for trial before the District Court upon the conclusion of the testimony and evidence, District Judge KNOX in October, 1924, directed judgment in favor of your petitioners and judgment was accordingly entered upon said direction.

Thereafter the plaintiffs in said three actions appealed to the United States Circuit Court of Appeals for the Second Circuit, and after argument of said appeals the said United States Circuit Court of Appeals, Second Circuit, on February 8th, 1926, unanimously affirmed the said judgments in favor of your petitioners, handing down an opinion by Circuit Judge HOUGH, which is found reported in 10 Fed. (2d), 697, a copy of which opinion is hereto annexed and marked Exhibit "B" (certiorari denied 271 U. S., 683, 685, 686). That by said opinion and decision, the United States Circuit Court of Appeals, Second Circuit, adjudged that your petitioners had a lawful right to make delivery of sugar under the said shipment clause from the said S. S. *West Cheswald.*

That the case at bar arose as follows:

That your petitioners had a contract with a concern known as T. S. Southgate & Company located at Norfolk, Virginia, for the purchase and sale and delivery at Philadelphia of the same Java White Sugar which it was provided should be shipped from Java in August and/or September, 1920. Said contract is found in full on page 128 of the record herewith submitted.

That the said contract was the same form of contract as had been executed and delivered between your petitioners and the plaintiffs in the above described actions in the United States District Court for the Southern District of New York, and that the shipment clause in the said contract with T. S. Southgate & Company read as follows:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia * * *."

That in accordance with the terms of said contract T. S. Southgate & Company caused a letter of credit to be posted by the National Bank of Commerce of Norfolk, Virginia, in the sum of $53,123.84 (see letter of credit, Rec., p. 122)[1] and that the shipment clause in said letter of credit was as follows:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia * * *."

That the form and wording of the shipment provisions in the said contracts involved in the three cases in the United States District Court for the Southern District of New York and found in the contract with said T. S. Southgate & Company of Norfolk, Virginia, and set forth in

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[1] Subsequent to its issue and on or about July 17th, 1920, some ten weeks before the sugar was shipped at Java, this letter of credit was modified so as to eliminate therefrom the requirement contained in the paragraph entitled "Documents," viz.:

> "And copy of Ocean Bill of Lading covering shipment Java to Philadelphia,"

so that as amended the said paragraph read:

> "Documents. Sight draft with invoice and order notify bill of lading attached."

(Plaintiffs' Exhibit 27, p. 123; Plaintiffs' Exhibit 47, p. 124.)

the letter of credit, posted by the said concern, T. S. Southgate & Company, were in all respects identical.

That your petitioners made delivery of the specified quantity of Java Sugar to T. S. Southgate & Company from the said S. S. *West Cheswald,* but that said T. S. Southgate & Company refused to take and pay for the said sugar.

That the National Bank of Commerce of Norfolk, Virginia having refused to honor its said letter of credit, your petitioners thereupon brought this action at bar in the District Court of the United States for the Eastern District of Virginia against the National Bank of Commerce of Norfolk, Virginia, for the sum of $48,009.81 based on the said letter of credit, wherein has been rendered the final judgment of the Circuit Court of Appeals for the Fourth Circuit which your petitioners now seek to have reviewed by this Honorable Court.

That upon the trial of the action at bar, a verdict was directed in favor of your petitioners. The defendant National Bank of Commerce appealed to the United States Circuit Court of Appeals for the Fourth Circuit. Said Circuit Court of Appeals handed down its decision on said appeal on the 21st day of October, 1924, reversing said judgment and directing a new trial. The opinion of the Court was by Circuit Judge Rose. It is reported in 2 Fed. (2d), 23. A copy thereof is hereto annexed and marked Exhibit "C."

That in reversing said judgment, the Circuit Court of Appeals, Fourth Circuit, held and decided that delivery of said sugar could not legally be made by your petitioners from the S. S. "West Cheswald" at Philadelphia, upon the ground that when her sugar cargo had been placed aboard

her at Java the said steamer was not at that time actually designed and intended to proceed to Philadelphia; and that your petitioners' duty under said shipment clause in said letter of credit obliged your petitioners to make delivery at said American port, i. e., Philadelphia, only from a steamer which, from the time of loading on board at a Java port or ports and from the moment of her departure from Java, was solely designed and intended to proceed direct to the designated port, i. e., Philadelphia.

That in so holding the Circuit Court of Appeals of the Fourth Circuit decided the obligation of your petitioners under said contracts and shipment clauses therein directly contrary to the said decision thereof of the United States Circuit Court of Appeals, Second Circuit; and that said conflicting decisions are based on identical purchase and sale contracts and on shipment clauses absolutely identical in form and contents and in respect to the same commodity delivered from the same steamship under the same bill of lading.

That the said judgment of the United States Circuit Court of Appeals (2 Fed. [2d], 23) Fourth Circuit, was not final. It reversed the judgment directed by District Judge GRONER and ordered a new trial of the action. Because it was an interlocutory judgment, and desirous of strengthening the case on the second trial, your petitioners served an amended notice of motion for judgment setting up certain additional matters which will appear from the amended notice of motion for judgment (Rec., p. 110).

That when the cause came on for retrial before District Judge GRONER your petitioners' offer of proofs and depositions taken in support of the amended allegations were excluded and exception taken. District Judge GRONER,

feeling constrained to follow the opinion of the United States Circuit Court of Appeals, Fourth Circuit, directed judgment for the defendant Bank, the National Bank of Commerce of Norfolk, Virginia, dismissing on the merits your petitioners' case against it.

That thereupon your petitioners took an appeal to the United States Circuit Court of Appeals, Fourth Circuit, from the said final judgment, and the same was argued on the 25th day of January, 1926, and was decided adversely to your petitioners, the opinion handed down on October 19, 1926, being annexed to this petition marked Exhibit "D," and from the judgment and decree entered on said affirmance on October 25, 1926, your petitioners now apply for a review by this Court by means of a writ of certiorari in accordance with the rules and regulations in such case made and provided.

III.

The said decision of the United States Circuit Court of Appeals, Fourth Circuit, in the above entitled action has decided an important question of local law arising in the States of New York, Pennsylvania and elsewhere in the United States, and its said decision is in conflict with decisions of the Supreme Court of the State of New York and of the Supreme Court of the State of Pennsylvania and certain other jurisdictions on the same subject-matter, to wit: the said shipment clause in said contracts and letters of credit to which your petitioners were parties.

That the decision of the United States Circuit Court of Appeals, Fourth Circuit, is directly contrary to the unani-

mous decision of the Supreme Court of Pennsylvania, in the case of

H. O. Wilbur Sons & Company v. *Lamborn*, 276 Pa., 479.

That was an action brought by a purchaser of Java White Sugar in the Court of Common Pleas, City of Philadelphia, to recover back the sum of $71,334, which had been collected by your petitioners against a letter of credit, upon allegations that your petitioners did not have the lawful right to make delivery of the said sugar from the S. S. *West Cheswald.*

That the contract provision and letter of credit provision for shipment was the same as the shipment provision in the letter of credit in the case at bar and in all the other cases which have been or shall be hereafter mentioned as cases wherein your petitioners were parties. That said case went up to the highest court of Pennsylvania and was decided by the Supreme Court of that State adversely to said Wilbur Sons & Company.

That the same objections and all of them to delivery by your petitioners from the S. S. *West Cheswald* discussed in the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, were urged on the Supreme Court of the State of Pennsylvania, and were all overruled, and that Court determined that delivery of sugars from the said steamship was in conformity with the said shipment clause in the contract and letter of credit precisely as the United States Circuit Court of Appeals, Second Circuit, so decided.

That said decision of the United States Circuit Court of Appeals, Fourth Circuit, is also in conflict with the de-

cision of the Supreme Court of the State of New York in the case of

Williams Ice Cream Co. v. *Lamborn and Chase National Bank*, 120 Misc., 301,

decided by Mr. Justice WAGNER at Special Term, New York County (modified on another ground and complaint dismissed 210 App. Div., 179).

Said action involved delivery of sugar from the same S. S. *West Cheswald*, and the plaintiff (purchaser) in that case sought to avoid the contract because of the bill of lading of said steamship, her original port of destination, and her diversion to the Port of Philadelphia, as well as her substitution for the S. S. *Chifuku Maru;* but was unsuccessful in so doing.

That in the case of

J. Hungerford Smith Company v. *Lamborn*, Supreme Court, Monroe County, reported in 200 N. Y. Supp., 292,

the plaintiff (purchaser) commenced an action to enjoin your petitioners from recourse against a certain letter of credit posted under the contract on the ground that the substitution of the S. S. *West Cheswald* for the S. S. *Chifuku Maru* was an illegal act by your petitioners, and that your petitioners had no right to deliver the sugar from the S. S. *West Cheswald*. In denying the injunction (and thereby deciding the action) Mr. Justice SAWYER of the Supreme Court of the State of New York at Special Term, Monroe County, overruled the purchaser's objections and held them all to be untenable, and reference is respectfully made to his decision published in 200 N. Y. Supp., 292.

That in the Fall of 1920 eleven purchasers commenced actions against your petitioners in the Supreme Court to enjoin and prevent the collection by your petitioners of the purchase price of sugar sold by them to the said plaintiffs, and which contracts were about to be performed by shipment to the plaintiffs f. o. b. Philadelphia from the said S. S. *West Cheswald*, and to cancel and rescind the said contracts of purchase on the ground that your petitioners had no right to make delivery from the said S. S. *West Cheswald*, as the said steamship could not be used as a delivering vessel for the said S. S. *Chifuku Maru*.

That all of said plaintiffs' motions for injunctions were denied and the cases dismissed.

That the decisions in said cases were rendered as follows:

Pennsylvania Milk Products Co. v. *Lamborn;*
L. Brenner Sons & Perloff v. *Lamborn;*
Mollen-Thompson & James Co. v. *Lamborn;*
Matthew Smith Tea, Coffee & Grocery Co. v. Lamborn;
T. H. McLain Grocery Co. v. *Lamborn;*
W. E. Sheppard & Co. v. *Lamborn;*
T. S. Southgate & Co. v. *Lamborn (Action No. 2);*
Williams Ice Cream Co. v. *Lamborn;*

(All decided by Mr. Justice BURR, sitting at Special Term, New York County, reported in New York Law Journal, issue of January 4th, 1921);

Telling Belle Vernon Co. v. Lamborn;

(Decided by Mr. Justice COHALAN, sitting at Special Term, New York County, reported in New York Law Journal, issue of December 22nd, 1920);

Central Sugar Co. v. *Lamborn;*

(Decided by Mr. Justice BENEDICT, sitting at Special Term, Kings County, reported 200 N. Y. Supp., 499; affirmed by Appellate Division, Second Department, 195 App. Div., 909);

J. Hungerford Smith Co. v. *Lamborn;*

(Decided by Mr. Justice SAWYER, sitting at Special Term, Monroe County, reported 200 N. Y. Supp., 292).

That your petitioners further show that the contract between your petitioners and T. S. Southgate & Company was made and entered into in New York by your petitioners, and that the place of performance, *i. e.*, delivery of the goods under said contract and under the letter of credit in suit herein was the port of Philadelphia, State of Pennsylvania, and that the Supreme Court of each of those States has decided the legality of your petitioners' delivery of said sugar under said shipment clause in favor of your petitioners, and that every decision on the same question in both State and Federal Courts has been in favor of your petitioners, and that the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, now sought to be reviewed, is opposed to and in conflict with all the other reported decisions and actual judgments rendered by any State and Federal Court on the same subject-matter.

That in the case at bar payment of the letter of credit issued by the National Bank of Commerce was to be made through the Bankers Trust Company of the City of New York, and that therefore the performance of the letter of credit, the contract in this action, was, by the parties, agreed to occur in the City and State of New York.

IV.

The said decision and judgment of the said United States Circuit Court of Appeals of the Fourth Circuit has erroneously decided an important question of general law affecting the entire subject-matter of purchase and sale contracts and shipments F.O.B. named place or port of designation, and that said decision and judgment is not only untenable but is in conflict with the weight of authority on the subject-matter rendered by the courts in the United States and England.

That the subject-matter, *i. e.*, a contract for a shipment f. o. b. Port of Philadelphia, U. S. A., involves one of the most extensive branches of commerce and presents one of the most important general rules of law applicable throughout the United States; and that the distinction between the principles of law applicable to contracts for shipment f. o. b. named port or place of destination and contracts c. i. f. has been ignored by the Circuit Court of Appeals, Fourth Circuit, or lost sight of, whereas said distinction is founded on vitally different elements of ownership and its unimpaired maintenance is of the utmost importance to the business world.

Your petitioners further show that the whole current of American and English authority, so far as reported, emphasizes the distinction between f. o. b. and c. i. f. contracts, and is opposed to the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, in the case at bar, as follows:

In the case of

Harrison v. *Fortlage*, 161 U. S., 57,

the contract called for delivery "ex ship" at an American port. The steamer upon which the original shipment was to be made at the Philippine Islands was named in the contract. There, likewise, the contract provided for delivery to the purchaser at Philadelphia "ex ship." The steamer named in the contract, the *Empress of India* on account of stress of weather was unable to carry all of her cargo to destination and a portion of it was discharged at the Island of Bermuda whence it was carried to Philadelphia by another ship. Obviously there was a new bill of lading covering the shipment from Bermuda to Philadelphia, but this Court held that the seller had fully complied with the provisions of the contract, that the contract was satisfied by loading on board the *Empress of India* at Manila, and that subsequent transportation and delivery of the goods were to be governed by the general rules of maritime law.

In the case of

> *Lamborn et al.* v. *Log Cabin Products Co.*, 291 Fed., 435,

where the same form of contract between seller and purchaser existed and the shipment clause therein was of course identically the same as in the letter of credit in the case at bar, your petitioners had declared to the purchasers, Log Cabin Products Co., the S. S. *Morocco;* but that steamer met with a casualty in the Red Sea and was detained at Port Said and compelled to transship her cargo to the S. S. *Manica* which arrived safely at New York, the port of delivery, with said cargo. But the purchaser refused to accept tender of the said sugar; and, the letter of credit having expired, your petitioners sued said purchaser for the damages resulting because of its

refusal to accept and pay for the goods. In that case there appeared two bills of lading, one of the S. S. *Morocco* and the other of the S. S. *Manica*.

The purchaser defended the action before District Judge BOOTH (now a Circuit Judge, Eighth Circuit), on the ground that your petitioners were obliged to deliver the sugar from the S. S. *Morocco* and had not the right to deliver it from the steamer to which the cargo had been transshipped; and upon the further ground that the arrival of the S. S. *Manica* was subsequent to the date of expiration of the letter of credit. These objections were overruled by District Judge BOOTH and the right of your petitioners to make delivery from another steamer than that originally declared was fully sustained in the opinion reported as above.

In the case of

Ashmore & Company v. *C. S. Cox & Company*, Law Reports (1899), 1 Q. B. D., 436,

which was a case on a contract calling for delivery at port of destination, it appeared that the seller had failed to make shipment, that is loaded on board a sailer or sailers within the specified time. Lord Chief Justice RUSSELL writing the opinion of the Court intimated that this was not fatal, and that the sellers if they could find a ship in the Port of London, which had made the designated shipment, might have substituted and made delivery from the ship so found.

Precisely the same ruling was made by the Supreme Court in the State of Massachusetts in

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100.

Therefore this Court and the Courts of Massachusetts and England have held in cases where delivery was to be made at the port of destination, that under a contract calling for shipment at a foreign port a direct or continuous voyage was not essential, but that the seller might make delivery at the port of destination of any goods which might be found in such port, and which had been loaded on board during the contract period.

That the cases cited in the opinion of the United States Circuit Court of Appeals, Fourth Circuit (by Rose, C. J.), are clearly distinguishable from the said current and weight of authority above set forth.

Bowes v. *Shand*, 2 App. Cas., 455; *Norrington* v. *Wright*, 115 U. S., 188; *Filley* v. *Pope*, 115 U. S., 213, were all cases where the seller had failed to make shipment in accordance with the terms of the contract of purchase and sale.

To this list also belongs the case of *The Manhattan*, 284 Fed., 310. In fact, in that case, default in supplying the designated ship was admitted and the question decided by the Circuit Court of Appeals was one of damages only.

Murray v. *Columbian Insurance Company*, 4 Johns. (New York) 443, was an action to recover back premiums paid on a policy of marine insurance where the ship did not make the voyage which was about to be insured.

Coming to the two other English cases in said opinion, *Landauer & Co.* v. *Craven & Speeding Bros.*, Law Reports (1912), 2 Kings Bench Division, 94, was a case arising on a cost, freight and insurance contract and was discussed and decided as such by the Kings Bench; and the remaining case cited, *Hansson* v. *Hamel & Horley, Ltd.* (1922), 2 App. Cases., 36, was also upon a cost, insurance and freight contract, and the discussion in the House of

Lords was as to the necessary requirements of performance by the seller under a cost, freight and insurance contract.

We beg leave to amplify this subject somewhat further but briefly in the petitioners' brief which is herewith submitted.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court directed to the United States Circuit Court of Appeals for the Fourth Circuit sitting at Richmond, Virginia, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings had by the Circuit Court of Appeals in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided in the Act of Congress approved March 3, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as may seem proper.

And your petitioners will ever pray.

LAMBORN & COMPANY,

By GEORGE H. LOGAN,
Petitioners.

United States of America,
Southern District of New York, } ss.:

GEORGE H. LOGAN, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition by him subscribed, and that the facts stated therein are true to the best of his information and belief.

GEORGE H. LOGAN.

Sworn to before me this 17th day of January, 1927.

JOHN L. SHEEHAN,
(Seal) Notary Public,
Queens County.
Certificate filed in New York County.
Commission expires March 30, 1928.

WE HEREBY CERTIFY that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Dated January 17th, 1927.

LOUIS O. VAN DOREN,
EDWARD R. BAIRD, JR.,
HENRY G. CONNOR, JR.,
EDWARD S. BENTLEY,
Counsel.

IN THE

Supreme Court of the United States

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, Surviving Partners of the Co-partnership of Lamborn & Company,
Petitioners
(Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or corporation, created by and under the Acts of Congress of the United States,
Respondent,
(Defendant Below).

BRIEF.

This case, we submit, comes precisely within the Supreme Court General Rule XXXV, Section 5, Subdivision (b).

Said section and subdivision of the rule reads as follows:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local de-

cisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

This case, we submit, falls within each of the three classes of cases first mentioned in the rule as being properly subject to review by certiorari from this Court.

The petitioners beg leave to set out the first three classifications in the rule in each of which this case belongs, viz.:

1. This petition sets forth a direct conflict between the decision of the Circuit Court of Appeals, Second Circuit, and the decision of the Circuit Court of Appeals, Fourth Circuit, upon the same matter;

2. The petition shows that in the case at bar the Circuit Court of Appeals, Fourth Circuit, has decided, contrary to state decisions, an important question of law where the said state decisions and the said decision of the Circuit Court of Appeals, Fourth Circuit, concerned identical clauses in a uniform series of contracts;

3. Also, the decision sought to be reviewed is upon an important question of general law, involving in reality the whole subject-matter of shipments and deliveries f.o.b., both in domestic and foreign commerce; and said decision is untenable and is in conflict with the whole weight of authority on the said subject-matter.

We believe that it must have rarely, if ever, happened that there have been so many decisions of state and federal courts on one series of shipping contracts, as have been rendered by state and federal courts in this country on the Lamborn Java White Sugar contracts. The very shipment clause, word for word, construed adversely to Lamborn & Company by the decision of the Circuit Court of Appeals, Fourth Circuit, now sought to be reviewed, has been repeatedly adjudicated by state and other federal courts, *uniformly in favor of the contention of Lamborn & Company;* and the decision by the Circuit Court, Fourth Circuit, sought to be reviewed, stands alone in all that array of decisions as the one judgment holding that Lamborn & Company had not the right under said contract and shipment clause to make delivery to their purchasers from the steamer *West Cheswald.*

The decision of the Circuit Court of Appeals, Fourth Circuit, therefore, is opposed to all the other decisions in this country on the same clause and contract; and unless your petitioners can secure a review of it in this Court, they must not only suffer the loss of upwards of $50,000, but there remains and must always remain a direct conflict as to what the law is, as to the duty of importers in making delivery from beyond the seas under the terms of an f.o.b. contract at an American port.

So that, unless this case be reviewed and the question settled by the Supreme Court, the law on that subject matter in the whole extent of the Fourth Circuit will be one thing, while the law of the States of Massachusetts, New York and Pennsylvania, and of the Second Circuit will be another and a different thing; and importers and merchants of the United States, shippers generally doing

an international or interstate business, will not know, and cannot be advised, what the uniform law is which governs their contracts and determines their obligations in performing them.

POINT ONE.

The decision of the Fourth Circuit sought to be reviewed is in direct conflict with the decision of the Second Circuit.

When Lamborn & Company in 1920 sold in this country the Java sugars purchased by them abroad, they prepared and used a uniform printed form of contract. This contract contained the following provisions as to shipment and delivery to their American customers:

> "F.O.B. cars Philadelphia, Pa., landed weights * * * Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The contract between Lamborn & Company and T. S. Southgate & Company in the case at bar was upon this printed form and contained the said provision. The contracts with Matthew Smith Tea, Coffee & Grocery Company, with the Pennsylvania Milk Products Company, and with L. Brenner Sons & Perloff, involved in the three cases in the Second Circuit, reported in 276 Fed., 325 and 10 Fed. (2d), 697, were likewise upon this printed form and contained the said provision.

The letter of credit issued by the National Bank of Commerce of Norfolk, Virginia, in the case at bar, which was supplied by T. S. Southgate & Company pursuant to said contract, likewise contained the said provision.

The sugar delivered to Matthew Smith Tea, Coffee & Grocery Company, to the Pennsylvania Milk Products Company and to L. Brenner Sons & Perloff, as well as to T. S. Southgate & Company, f.o.b. Philadelphia, all came from the same ship, *West Cheswald*, and had been carried by the *West Cheswald* from Java to Philadelphia under the same ocean bill of lading containing the clause:

"Port Said, option New York."

In the three cases in the Second Circuit, the respective banks which had issued the letters of credit duly honored them and paid Lamborn & Company's drafts; thereafter Lamborn & Company's customers, in order to assert their claim that Lamborn & Company had breached their contracts and had failed to deliver the sugar called for therein, brought suits against Lamborn & Company as for money had and received.

But in the case at bar, the National Bank of Commerce of Norfolk refused to honor its letter of credit and instructed the Bankers Trust Company of New York not to make payment under it. So that Lamborn & Company, as plaintiffs, brought the suit at bar against the National Bank of Commerce of Norfolk, Virginia.

The sole ground for denying Lamborn & Company a recovery herein was that, as the Fourth Circuit held, Lamborn & Company had failed to comply with the shipment provision of said letter of credit above quoted in that the sugar covered by the documents presented to the defendant Bank had not been shipped "from Java to Philadelphia" but had been shipped on the *West Cheswald* under an ocean bill of lading reading "Port Said, option New York." (The record of the case at bar shows the meaning of these words "Port Said, option New York"

and in the discussion under Point Three of the untenable nature of the decision of the Fourth Circuit, we shall state that explanation.)

The Court will observe on examining the record of the case that the Bankers Trust Company, after examination, declared that Lamborn & Company's documents, among which was the said bill of lading, were "in order" and so advised the National Bank of Commerce of Norfolk, and strongly urged the defendant Bank to honor its letter of credit and to permit the Trust Company in New York to make due payment thereunder.

When the three cases above referred to came on to be heard in the Circuit Court of Appeals, Second Circuit, that Court had before it the first decision (2 Fed. [2d], 23 of the Fourth Circuit), in the case at bar, and it was urged upon that Court that Lamborn & Company had failed to comply with the shipment provision of the contract for the reasons stated by Circuit Judge ROSE in that opinion.

But the Second Circuit refused to hold that Lamborn & Company had breached its contract. On the contrary the Second Circuit held that Lamborn & Company had performed it; that the shipment on board the *West Cheswald* was a shipment from Java to Philadelphia, hence that Lamborn & Company was entitled to retain the purchase money of the sugar. Circuit Judge HOUGH said:

> "Reduced to its lowest terms, Smith Company was entitled to a certain quantity of Java sugar f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled."

Therefore, here is a situation, we submit, falling precisely within the first clause of Subdivision (b) of Section 5 of Rule XXXV, which provides for the granting of

a writ of certiorari "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same subject-matter."

That this direct conflict may not be evidenced only by allegations of your petitioners or by argument of counsel, we have annexed to the petition the opinion of the Circuit Court of Appeals, Fourth Circuit, adhered to and confirmed by the final judgment of that Court now sought to be reviewed, and the opinion of the Circuit Court of Appeals, Second Circuit, in the three cases against your petitioners decided in that jurisdiction. So that from a perusal of the opinions of the two Circuits, the fact of the identity of the question and the fact of the existing conflict between the two Courts on the same matter may be self-evident.

We think that Judge HOUGH's comments on the decision of the Fourth Circuit in 2 Fed. (2d), 23, cannot affect either the existence or the reality of the conflict of the decision between the two Circuits.

The letter of credit in the case at bar provides "shipment to be made during August-September, 1920, at option of sellers from Java by steamer or steamers to Philadelphia." The contracts in the cases decided by Judge HOUGH in the Second Circuit provided "shipment to be made during August-September, 1920, at option of sellers from Java by steamer or steamers to Philadelphia."

These provisions do not differ by a single word or by a single mark of punctuation. Yet in the Second Circuit it was held that Lamborn & Company had complied with the said provision; while in the Fourth Circuit it was held that Lamborn & Company had not.

Therefore, we respectfully submit that there is no distinction between the cases in the Second Circuit and the case in the Fourth Circuit sought to be reviewed, and that Judge HOUGH's comments upon the decision in the Fourth Circuit were no more than an expression of respect to the Circuit whose decision was about to be rejected as unsound in law and fact.

POINT TWO.

The decision and judgment sought to be reviewed is in direct conflict with the decisions of local law existing in the State of Pennsylvania, where the purchase and sales contract was to be performed by delivering the sugar F.O.B. cars, and in the State of New York, where the letter of credit was to be performed, i. e., by the Bankers Trust Company making payment to Lamborn & Company on presentation of documents.

In the case of *Williams Ice Cream Co., Inc.* v. *Chase National Bank and Lamborn & Company* (*supra*), to which we referred in our petition, the contract was likewise upon the same printed form as in the case at bar, and contained the same shipment clause. The same objection against the legality of delivery from the *West Chesuald*, which was held fatal by the Circuit Court of Appeals, Fourth Circuit, was presented to the New York Court. But the Special Term (Mr. Justice WAGNER) held the point of no weight. He said, at page 305:

> "Plaintiff urges that the sugar was not a shipment from Java to Philadelphia, but to New York; * * * In other words, that a shipment is not the

course that a designated vessel takes, but a course intended that it should take. This refinement to me seems more one of sophistry than reason and carries with it failure of conviction."

Mr. Justice WAGNER dismissed the complaint, but without costs (120 Misc., 301). Upon appeal to the Appellate Division, however, the judgment was modified so as to dismiss the complaint with costs, and as thus modified, affirmed (210 App. Div., 179).

Again, Mr. Justice SAWYER of the New York Supreme Court, at Special Term at Rochester (Monroe County), decided that Lamborn & Company had the right to make delivery of these sugars from the *West Cheswald*: See *J. Hungerford Smith* v. *Lamborn*, 200 N. Y. Supp., 292.

Again, in a case which came before him at Special Term of the Supreme Court, New York County,

Telling Belle Vernon Co. v. *Lamborn*, New York Law Journal, December 22nd, 1920,

Mr. Justice COHALAN, in denying an injunction to restrain Lamborn & Company from collecting against a letter of credit, held in substance and effect that a delivery of sugar from the S. S. *West Cheswald* was lawful and in compliance with the contract.

A similar decision was handed down by Mr. Justice BENEDICT sitting at Special Term, Kings County, in the case of

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed without opinion 195 App. Div., 909.

Again, in eight cases which came before him at Special Term, New York County, Mr. Justice BURR (afterward of

the Appellate Division, First Department) in denying injunctions against Lamborn & Company, held that deliveries of sugar from the said S. S. *West Cheswald* complied with the contracts:

> *Pennsylvania Milk Products Co.* v. *Lamborn;*
> *L. Brenner Sons & Perloff* v. *Lamborn;*
> *Mollen-Thompson & James Co.* v. *Lamborn;*
> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn;*
> *T. H. McLain Grocery Co.* v. *Lamborn;*
> *W. E. Sheppard & Co.* v. *Lamborn;*
> *T. S. Southgate & Co.* v. *Lamborn* (Action No. 2);
> *Williams Ice Cream Co.* v. *Lamborn.*
>
> (All reported in New York Law Journal, issue of January 4th, 1921.)

Again, in Pennsylvania, the state of delivery, the same contention was made in the case of

> *H. O. Wilbur Sons & Co.* v. *Lamborn,* 276 Pa. State, 479.

The contract was upon the same printed form and contained the same shipment clause which we have described. There it was argued with great learning and ability through all the courts of Pennsylvania that Lamborn & Company could not lawfully make delivery of said sugar at the port of Philadelphia from the said S. S. *West Cheswald* owing to the nature and contents of her bill of lading. But once more the point was held not to have been well taken, the Supreme Court of Pennsylvania saying:

> "Some point is made * * * of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this di-

> version was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia.'"

The same view thus expressed by the courts of New York and Pennsylvania was taken by United States District Judge LAWRENCE D. GRONER upon the first trial of the case at bar. He said:

> "The letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage was commenced, it seems to me that it would be a compliance with the contract. It would be all that reason and fair play and justice would require". (Rec., p. 54).

The disregard by the Circuit Court of Appeals, Fourth Circuit, of the law so laid down was not inadvertent. The cases above referred to were urged upon it in behalf of Lamborn & Company. They were expressly noticed and repudiated by Circuit Judge ROSE in his opinion. He said:

> "That point of view is in substance the same as that which has commended itself to the Courts

> which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Philadelphia it made no difference that when the shipment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York" (Rec., p. 87).

Therefore, we submit that there was in this case a deliberate repudiation by the Fourth Circuit of the local law as laid down in the States of New York and Pennsylvania; and that the decision here sought to be reviewed is in conflict therewith, and was recognized and intended so to be by the United States Circuit Court of Appeals, Fourth Circuit.

Consequently we submit that this case falls within the second clause of Subdivision b of Section 5 of Rule XXXV of this Court which permits the issuance of a writ of certiorari to a Circuit Court of Appeals which "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Here the conflict cannot be termed "probable." It is deliberate and expressed.

POINT THREE.

The decision and judgment sought to be reviewed has decided an important question of general law in a way untenable and in conflict with the weight of authority, both in America and England.

The volume of interstate and international business conducted by contracts f.o.b. or c.i.f. is incalculable. The initials f.o.b. and c.i.f. are as common in use and as well understood by merchants as the alphabet.

But like all fundamental things, they differ widely in meaning and effect.

Where a merchant sells f.o.b. named port or place, he retains title and ownership of the goods until they are delivered to the carrier, until they are placed "free on board" ship or freight car or other carrying vessel. They are, until that delivery is made, the merchant's goods, his own and no one else's.

But where the sale is cost, freight and insurance, commonly here called c.i.f., the goods are the purchaser's from the moment of delivery to the carrier, of the payment of the freight, and the taking out of the insurance.

So that if these Lamborn contracts had been c.i.f. contracts, the goods from the moment of loading at Java would have been the purchaser's goods. Insurance would have had to cover a definite voyage, and freight would have been paid for that definite voyage, and Lamborn & Company's interest in the goods and in the bill of lading would thereupon have ceased at Java.

But being f.o.b. Philadelphia, Lamborn & Company retained title and ownership of the goods until they had reached Philadelphia, and until they had been loaded on board the railroad cars. Being f.o.b. Philadelphia, the ownership of the goods was in Lamborn, the bill of lading was theirs, the control of the goods was theirs, and the entire obligation set out in their contract was, as pointed out in the Second Circuit, delivery to the purchaser at Philadelphia of Java White Sugar, shipped in due season (the stipulated months from a Java port). Hence the goods were Lamborn & Company's, the bill of lading was theirs, the right of insurance was theirs, and the purchaser's title to the property accrued and came into ex-

istence for the first time when the sugars were loaded on board railroad cars at Philadelphia. Except for the decision of the Fourth Circuit in the case at bar now sought to be reviewed, every reported case in the United States and in England, where the subject-matter of the controversy was a contract f.o.b. named American or English port, has uniformly upheld the right of the importer to make delivery from any ship which reached the port or was in the port, provided she carried the stipulated goods and that they were shipped in the agreed foreign country, that is, laden on board, within the agreed period of time; quite regardless of whether it was one ship or another that carried them, and quite regardless of the voyage the ship had made.

There never has been a departure from this rule, until the decision was rendered which is now sought to be reviewed. There has never been a decision to the contrary in either American or English jurisdiction.

The cases cited by Mr. Benjamin in his work on Sales (5th Edition, pp. 588-9) supposed by many to be decisions denying the right of substitution of vessels, are not such decisions. We refer to:

Reuter v. *Sala*, Law Reports 1879, 4 Com. Pleas Div., 239;
Busk v. *Spence*, 4 Camp., 329 (1815);
Graves v. *Legg*, 1854, 9 Exch., 709.

Not one of them is a case against the use of one vessel rather than another. *All were cases where there was a plain violation of express language of the contract, either in respect to shipment, i. e., lading, or in respect to the declaration of vessels within the agreed period of time.*

On the other hand, the decisions holding that the importer performing an f.o.b. contract calling for delivery at a certain American or English port, might make delivery off of any vessel which carried the goods, shipped on her in the time stated, form an unbroken line of authority from early times down to the present day and include about forty of the *Lamborn* cases.

Thornton v. *Simpson*, 6 Taunt., 556;

Ashmore & Co. v. *C. S. Cox & Co.*, Law Reports 1899, 1 Q. B. D., 436;

Harrison v. *Fortlage*, 161 U. S., 57;

Carver v. *Sassoon*, 17 Com. Cases, 57;

El Reno Wholesale Grocery Co. v. *Lamborn* and 28 other cases decided simultaneously therewith, Special Term, New York County, New York Law Journal, December 15th, 1920;

Telling-Belle Vernon Co. v. *Lamborn, et al.*, New York Supreme Court, New York County, New York Law Journal, December 22nd, 1920;

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed 195 App. Div., 909;

Pennsylvania Milk Products Co. v. *Lamborn* and six other cases decided simultaneously therewith, New York Supreme Court, New York County, New York Law Journal, January 4, 1921;

J. Hungerford Smith Co. v. *Lamborn*, 200 N. Y., Supp., 292;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, District Court, Southern District of New York, 276 Fed., 325;

Lamborn v. *Log Cabin Products Co.*, 291 Fed., 435;

Lamborn v. *National Exchange Bank of Anderson, Indiana*, United States District Court, District of Indiana, ANDERSON, U. S. D. J.;

H. O. Wilbur Sons & Co. v. *Lamborn*, 276 Pa. State, 479;

Williams Ice Cream Co. v. *Lamborn*, 120 Misc., 301; 210 App. Div., 179;

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100;

Gambrill Mfg. Co. v. *American Foreign Banking Corporation and E. R. Sherburne Co.*, 194 App. Div., 425;

Pennsylvania Sugar Refining Co. v. *Czarnikow Rionda Company*, Circuit Court of Appeals, Third Circuit, 245 Fed., 913;

Iasigi v. *Rosenstein*, 141 N. Y., 414;

Cunningham v. *Judson*, 100 N. Y., 179;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn and two other cases decided simultaneously therewith*, Circuit Court of Appeals, Second Circuit, 10 Fed. (2d), 697.

This rule thus firmly and widely established in American and English law, that an importer operating under a contract f.o.b. Port of Philadelphia or Port of London or Port of New York, may make delivery at said port from any available vessel, carrying the goods which were shipped in time, is not in conflict at all with the well known decisions of this Court and of England that the shipment of the goods must be in time, *i. e.*, the goods must be laden on board at the foreign port or wherever

else the shipment was to be made, within the time specified by the contract and wholly within that time. We refer to such cases as

Bowes v. *Shand*, L. R. 2, App. Cases 455;
Filley v. *Pope*, 115 U. S., 213;
Norrington v. *Wright*, 115 U. S., 188.

In all of those cases facts were present showing that the seller had failed to make the agreed shipment. This, we submit, is an utterly different branch of the law. In *Bowes* v. *Shand*, the rice had been not wholly shipped within the designated months. In *Norrington* v. *Wright*, the rails had not been shipped in the designated quantities within the designated months; and in *Filley* v. *Pope*, the Scotch iron had not been shipped from the named port but from another than that stipulated in the contract. If the petitioners had shipped the sugar from India instead of from Java that case would have applied. But it had no relation to the subject-matter.

The opinion of the Fourth Circuit (by Circuit Judge Rose, 2 Fed. (2d), 23), affirmed and followed into final judgment by the decision of the Fourth Circuit sought to be reviewed, while refusing to follow the numerous English decisions on f.o.b. contracts and shipments, and the very many state and federal decisions directly on the Lamborn shipment clause under the Lamborn f.o.b. contracts, failed to cite a single authority either in American or English law, that Lamborn & Company had not the right to make delivery at Philadelphia of this sugar from the *West Cheswald* because her bill of lading contained the words "Port Said, option New York" covering destination, instead of the words "Philadelphia, Pa."

The words "Port Said, option New York" are testified

to in the record before this Court as meaning this: That within a certain time of the arrival of the vessel at Port Said, Lamborn & Company had under its bill of lading the option to send this vessel to any other port, and that failing the exercise of the option she would then proceed as a matter of course to New York (Rec., p. 197). So that when this ship was loaded at Java and proceeded towards Port Said, Lamborn & Company had the right, if they chose, to direct her to go to Philadelphia instead of New York. She was destined for no particular port but could go to any one. She was carrying Lamborn & Company's sugars, out of which they could make delivery at any port where they had agreed to deliver sugars so laden.

The objection to this is, we submit, so tenuous, indeed absurd, that it is difficult to discuss it. Mr. Justice WAGNER dismissed it as sophistry. District Judge GRONER said in substance that the objection involved injustice and unfairness. The Second Circuit said bluntly that the ship performed the contract. The Supreme Court of Pennsylvania said, in effect, that Lamborn had made no contract for a direct voyage, but that even if the Lamborn contract had called for a direct voyage from Java to Philadelphia, that court would not necessarily have held that the *West Cheswald* had failed to make such a direct voyage.

But the Lamborn contract with T. S. Southgate & Co. and the shipment clause of the letter of credit issued by the defendant National Bank of Commerce *did not anywhere specify or stipulate for a direct voyage from Java to an American port.*

One reads the opinion of the Circuit Court, Fourth Circuit, again and again, in a vain attempt to find therein the substance to the objection.

The learned Circuit Judge who wrote that opinion did attempt to formulate some basic ground, some sort of reason why he deemed it necessary to hold that we could not deliver from the *West Cheswald*. It is, we submit, if found anywhere, to be found in the following words:

> "Now it is true, as it is pointed out by learned counsel for the seller that the contract here is not a c.i.f. contract, *but it is one under which the buyer has an insurable interest and is therefore one which so far as this question is concerned governed by the same principle*."

But this stated reason is utterly fallacious and entirely inadequate to change an f.o.b. contract Philadelphia into a c.i.f. contract Java port.

We submit that the purchaser of this sugar f.o.b. Philadelphia had no insurable interest *in the sugar* as long as it was Lamborn & Company's. It was our sugar until delivered aboard railroad cars at Philadelphia. The purchaser had no insurable interest in our goods.

But the purchaser, like any other purchaser, could have insured his *profits* (circumstances permitting it at the time of his application for such insurance) and on the re-trial of this case petitioners by amendment and by competent expert evidence and documents under the amended notice of motion for judgment sought to prove that any right of the purchaser T. S. Southgate & Co. to insure its profits under its contract with Lamborn & Company was not in the least impaired by the nature of the bill of lading of the S. S. *West Cheswald* which carried the sugar or by her diversion off the coast of New Jersey to the port of Philadelphia there to make delivery. (See amended notice of motion for judgment, p. 110; see deposition of Richard Jones and exhibits attached, Rec., p. 197).

So that if alleged interference with the purchaser's right to insure his profits was the reason, the basic ground for the decision of the Fourth Circuit, it was a fallacy. It was controverted by the practice of insurance of profits, by the rules of the great insurance bodies of the Atlantic coast and of England, and it was controverted by the very forms and contents of binders and policies which are in use in the business of insurance of profits and which provide on their face for substitution of steamers and for diversion of the carrying vessel and her entering into other ports or making a different voyage. (See deposition of Jones and exhibits.)

We submit the Court will find in this record clear evidence on the subject of insurance of profits, clear evidence that the purchaser, T. S. Southgate & Company's right to insure profits (if they could have done so under the circumstances) was not prejudiced or impaired and could not have been prejudiced or impaired to the slightest degree by the nature of the bill of lading of the S. S. *West Cheswald*, by her stated designation Port Said, option New York, or by her diversion on the high seas to the port of Philadelphia.

We submit this error should no longer persist, and that this Court should correct it.

Nor is there a decision in the books (and counsel writing this brief have examined every reported case on the right and practice of insuring profits under a contract of purchase and sale which can be found in the English and American law books) which holds or has ever held that the purchaser under an f.o.b. contract, Philadelphia, such as the Lamborn contract in this case, had any right of insurance of the goods on board the vessel; nor is there a case in the books which holds (except the Circuit Court

decision of the Fourth Circuit now sought to be reviewed) that the purchaser's right to insure his profits under a purchase and sale contract covering goods to be imported by the seller and delivered f.o.b. American port to the purchaser, was impaired or prejudiced to the slightest degree by transshipment of the goods, by the port or ports of destination of the vessel or vessels, or by the ship's diversion from one port to another.

Counsel flatly say that no such case or cases exist.

The decision of the Fourth Circuit, ignoring *Harrison* v. *Fortlage, supra,* overruling District Judge HAND in *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, supra,* and Mr. Justice SAWYER in *J. Hungerford Smith Co.* v. *Lamborn, supra,* and Mr. Justice WAGNER in *Williams Ice Cream Co.* v. *Lamborn, supra,* the Supreme Court of Pennsylvania in *H. O. Wilbur Sons & Co., Inc.* v. *Lamborn, supra,* and all the other cases which we have above mentioned defining the seller's obligation under f.o.b. contracts, is undoubtedly based on two things: (1) the principle decided in *Bowes* v. *Shand, Norrington* v. *Wright* and *Filley* v. *Pope,* that the shipment must be made in time and in the specified quantity; and (2) on the assertion that the purchaser's right to insure the sugar, brought the case within the rule of c.i.f. contracts and was violated by the shipment made on the *West Cheswald.*

There can be no doubt that the decision of the Fourth Circuit, sought to be reviewed, was written about the case of *Filley* v. *Pope.* It is a misapplication of that case.

There can be no doubt that the dictum in that case concerning insurance contained in the opinion of Mr. Justice GRAY, namely:

> "* * * the buyer would have an insurable interest in the iron during the voyage by reason of

> the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market. 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Co.*, 16 Pickering 397; *Eastern Railroad* v. *Relief Insurance Co.*, 98 Mass. 420, 423."

was the cornerstone of said Fourth Circuit's decision. It follows that we must examine the source and origin of that dictum.

Chancellor KENT in 3 *Kent's Com.*, 276, summarized the decision of the House of Lords in the case of *Lucena* v. *Crauford*, 5 Bosanquet & Pullers, 269, to the general effect that "commissions to become due to public agents and all reasonable expectation of profits, were insurable interests."

The Chancellor's distinguished Editor (6th Ed.), cited *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, 423. In this case the opinion of the Massachusetts Supreme Court was written by Judge GRAY. It was not an action on an insurance policy insuring profits. It was an action on a *fire* insurance policy insuring the railroad company against "their liability for loss and damage by fire occasioned by sparks from railroad engines to property of others situated on lands not owned or occupied by the insured."

In the course of his opinion in the case, Judge GRAY said:

> "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. 3 *Kent's Com.* (6th ed.) 276; *Insurance Co.* v. *Chase*, 5 Wallace, 509, 513; *Wilson* v. *Jones*, Law Rep. 2 Exch., 150, 151."

Insurance Co. v. *Chase*, 5 Wallace, 509, need not be discussed, as it was not a case of insurance of profits; *Wilson* v. *Jones*, Law Reports, 2 Exch., 139, was an action on an insurance policy taken out by a shareholder in the Atlantic Telegraph Company, involving the laying of the first submarine cable. *Lucena* v. *Craufurd*, was a case of the insurance of the commission for the sale of Dutch property under an English statute, 35 George III, Chapter 80, Section 21, of Dutch ships actually seized under orders of the British Government. It had nothing to do with the insurance of profits. *French* v. *Hope Insurance Co.*, 16 Pickering, 397, was an action to recover on a policy of insurance. It is enough to say that the assured had bought and paid for a one-half interest in the cargo.

The foregoing being the real nature of the cases referred to by Mr. Justice GRAY when he read the decision in 1868 for the Supreme Court of Massachusetts in the case of *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, we find the same citations by him in his opinion of the Court in *Filley* v. *Pope*, namely: 3 *Kent's Commentaries*, 276, *French* v. *Hope Insurance Company*, 16 Pickering, 397, and *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420.

And curiously enough when the very learned and distinguished Justice came to write for the Court in *Harrison* v. *Fortlage*, he again cites, as authority for the alleged insurable interest, the same cases, namely: *Insurance Co.* v. *Chase*, 5 Wallace, 509-513; *Filley* v. *Pope*, 115 U. S., 213-220; *Wilson* v. *Jones*, L. R., 2 Exch., 139, 3 *Kent's Commentaries*, 276.

So that we very respectfully submit that the cases cited by Mr. Justice GRAY were not based on the practice and business of insurance of profits, did not involve any such

contract and were not in a single instance a case where profits had been insured by a purchaser. And that the learned Justice consistently adhered to the same citations from 1868 down to at least *Harrison* v. *Fortlage* in 1895.

Now when we come to the simple truth, the plain fact that the purchaser's right to insure profits under this Lamborn contract and on any other contract like it, is not vitally concerned with the terms of the original loading or with the name of the ship or with its voyage or course, but that it stands unimpaired, as good as ever, whether it be one ship or another, whether there be a deviation or not, whether the name of the vessel be changed, it is apparent that the reason sought to be found in the subject-matter of insurance of profits by a purchaser for holding that there was an implied obligation in our contract, that the loading should be originally for Philadelphia and that the ship should proceed direct to that port, disappears.

Therefore, we submit the case at bar falls precisely within the third of the first three clauses of Subdivision (b) of Section 5 of Rule XXXV, which provides for the granting of a writ of certiorari, where a Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority."

POINT FOUR.

The writ of certiorari prayed for by the petitioner should be granted and the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, in the case at bar should be reviewed by this Court.

Respectfully submitted,

LOUIS O. VAN DOREN,
EDWARD B. BAIRD, JR.,
HENRY G. CONNER, JR.,
EDWARD S. BENTLEY,
Attorneys for Arthur H. Lamborn, *et al.*, Petitioners.

EXHIBITS.

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"A"—Opinion of District Judge Learned Hand in the case of Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn (and two other cases decided simultaneously therewith), rendered in the United States District Court, Southern District of New York, reported 276 Fed., 325 47

"B"—Opinion of Circuit Judge Hough in the case of Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn (and two other cases decided simultaneously therewith) rendered in the United States Circuit Court of Appeals for the Second Circuit, reported 10 Fed., 2nd, 607 50

"C"—Opinion of Circuit Judge Rose in the case of National Bank of Commerce of Norfolk *v.* Arthur H. Lamborn, *et al.*, rendered in the United States Circuit Court of Appeals, Fourth Circuit, reported 2 Fed., 2nd, 23..... 57

"D"—Opinion of Circuit Judge Rose in the case of Arthur H. Lamborn, *et al. v.* The National Bank of Commerce of Norfolk, Virginia, rendered in the United States Circuit Court of Appeals, Fourth Circuit, reported 15 Fed., 2nd, 473 74

Exhibit "A."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MATTHEW SMITH TEA, COFFEE & GROCERY COMPANY

against

ARTHUR H. LAMBORN, *et al.*, copartners doing business under the firm name and style of LAMBORN & COMPANY.

LEARNED HAND, D. J.: Under the State practice the motion would be denied because none of the articles of the answer objected to could possibly embarrass the plaintiff on a trial. The State courts are always loath to undertake the reformation of pleadings, by paring and pruning, for the same reasons which would have deterred a lesser hero than the son of Alemene from undertaking his twelve labours. However, the plaintiff has presented the substance of the case upon this motion and cannot complain, if I decide it upon the merits against it.

None of the cases cited appear to me to touch the situation except Thornton *v.* Simpson, 6 Taunt 556, and two decisions in State courts upon this very contract. The whole case turns upon whether the defendant had the right to substitute the *West Cheswald* for the *Chifuku Maru*. I think that it had. The contract was for the sale of sugar by weight and quality, to be shipped from Java August-September, 1920, by steamer or steamers to Philadelphia, "Names of such steamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract."

Now it is clear that without the clause just quoted the seller would have been obliged generally to deliver. The sale was of fungibles and not of a cargo, already loaded on a given ship. Moreover, the seller might withhold his declaration of the steamers for as long as he chose. The case is not like Steinhardt *v.* Bingham, 182 N. Y. 326, where the declaration had to be within five days after bill of lading received. However, for as long as he did withhold, he remained generally liable. His declaration limited his obligation by excusing him in case the declared steamer should "fail to arrive." Hence the defendant is right in saying that the clause was for the seller's benefit only, Neill *v.* Whitword, 18 C. B. (N. S.), 435, Harrison *v.* Fortlage, 161 U. S. 57, 64. Clearly under this contract the buyer could have no interest in the particular ship on which the sugar arrived, so long as it was shipped "August-September."

I do not find it necessary to hold that, having once unconditionally declared a steamer, the seller could substitute another in every conceivable circumstance. For example, if the *Chifuku Maru* had been unconditionally declared and then lost, it perhaps would be reasonable that the buyer should be excused, because otherwise the seller could hold him if the price fell, though he could not hold the seller if it rose. Yet even then, it must be remembered that the contract does not read "no arrival, no sale." It is specifically a release only of the seller.

However that may be, the *Chifuku Maru* was not lost and was in no danger of loss, and the case seems to be within Thornton *v.* Simpson, *supra,* as well as the decisions on this contract of Mr. Justice SAWYER and Mr. Justice SHOEMAKER. If these be right, the seller could substitute, unless because the *West Cheswald* being nearer port, was less likely to be lost. That appears to me a

fanciful distinction, even assuming that the seller would not have had the right to put another cargo to the buyer, had the *Chifuku Maru* been actually lost. Hence I should think that even if the seller had made an unconditional declaration, Thornton *v.* Simpson, *supra,* was applicable, and he might substitute as he did, the buyer's position being in effect unchanged.

But the seller never made an unconditional declaration and the point does not arise. In his letter of August thirtieth, he expressly reserves the right to substitute another vessel. This he had the right to do, because he was only to declare "later." His letter amounted to saying that he then intended to ship by *Chifuku Maru* and *Washington Maru,* but might later decide to ship by another vessel. The buyer, having no right to a declaration at any given time, lost nothing by this. Nor did his letter of September twenty-ninth change this situation. The only "declaration" under the contract was on August thirtieth, "We hereby declare," etc. The second merely specified the time of sailing of the *Chifuku Maru* already provisionally declared. It is to be read with the first letter and is not to be taken as modifying its terms. The first alone was an act under the contract. On December thirteenth, when the substitution was made, I think the reservation contained in the original declaration was still in effect.

As to the custom pleaded in the Twenty-ninth article of the answer, it seems to me so clear that it does not contradict the contract, that I need do no more than allude to it.

The defense is entirely good in law and the motion is denied for that reason.

July 18, 1921.

D. J.

Exhibit "B."

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before—Hon. HENRY WADE ROGERS,
Hon. CHARLES M. HOUGH,
Hon. MARTIN T. MANTON, Circuit Judges.

MATTHEW SMITH TEA COFFEE AND GROCERY COMPANY,
Plaintiff-in-Error and below,

v.

ARTHUR H. LAMBORN, *et al.*, trading as LAMBORN & CO.,
Defendants-in-Error and below.

THE PENNSYLVANIA MILK PRODUCTS CO.,
Plaintiff,

v.

ARTHUR H. LAMBORN, *et al.*, trading as LAMBORN & CO.,
Defendant.

LOUIS BRENNER, *et al.*, trading as L. BRENNER, SONS AND PERLOFF,
Plaintiffs,

v.

ARTHUR H. LAMBORN, *et al.*, trading as ARTHUR H. LAMBORN & CO.,
Defendants.

Writs of error to judgments entered in the District Court for the Southern District of New York.

These cases were tried together, and except for variations in names and quantity of goods concerned are alike. In all both parties moved for a directed verdict, the Court granted the defendants' motions, whereupon plaintiffs took these writs. The facts productive of the points of law involved are found in the evidence relating to the action of the Smith Company, as follows:

In April, 1920, Lamborn and Smith Company entered into a written contract for the sale by Lamborn of a considerable quantity of Java white sugar, concerning which it was provided that payment was to be made

> "by net cash on presentation of sight draft with invoice and bill of lading attached in New York. Buyers to open * * * confirmed irrevocable letter of credit in favor of Lamborn & Co."

at a named bank.

The written contract continued thus:

> "Shipment.
> Shipment to be made during August-September, 1920 at option of the sellers from Java by steamer or steamers to Philadelphia, Pa. Names of such steamer or steamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract."

During August-September, 1920, Lamborn shipped from Java sugar of the kind described and in amount sufficient to fulfil the bargain with Smith Company, on several steamers, to wit, at least the *West Cheswald* and the *Chifuku Maru.*

On August 30, 1920 Lamborn advised Smith Company in writing thus:

> "We hereby declare that the steamers *Chifuku Maru* and *Washington Maru or substitutes* will carry"

the sugar contracted for by Smith Company.

On September 29, 1920, Lamborn advised Smith Company in writing thus:

> "We have received advices that the SS *Chifuku Maru,* carrying your Javas * * * sailed from Java August 22 and is due to arrive the latter part of October."

Chifuku Maru broke down, had to stop at Port Said, and was subjected to very great delay, though she ultimately arrived in Philadelphia having on board the sugar that had been intended for Smith Company and the other plaintiffs-in-error.

Owing to the delay in repairing the *Chifuku Maru,* Lamborn notified Smith Company in writing on December 13, 1920, that owing to the delay aforesaid,

> "We hereby declare the steamer *West Cheswald* carrying the same quality of sugar and having made the same shipment from Java in fulfilment of your contract, which steamer is expected to arrive in Philadelphia this week."

The *Cheswald* did arrive with the same kind of sugar on board shipped at the same time and Smith Company refused it, but under the irrevocable credit above referred to Lamborn, producing proper shipping documents, was paid, and Smith Company brought this action to recover the sale price from Lamborn on the ground that Lamborn had not fulfilled his contract.

By written notification before suit, and by pleading, Smith Company's sole assigned reason for refusing sugar and suing for the sale price is that having declared *Chifuku Maru* as carrying Smith Company's sugar Lamborn had no right to change the declaration and tender sugar *ex West Cheswald.*

LEAVITT J. HUNT and H. VICTOR CRAWFORD, for Plaintiffs-in-Error;

LOUIS O. VAN DOREN, ALFRED C. B. MCNEVIN and EDWARD S. BENTLEY, for Defendants-in-Error.

HOUGH, C. J.:

Lamborn sold Java sugars f. o. b. Philadelphia to many persons, and apparently exacted as many irrevocable credits covering payment to him for the same. When the sugars on the *West Cheswald* arrived, goods for which buyers were willing to pay twenty-two cents a pound at contract date, would fetch no more than eleven cents.

This fact does not affect the legal questions involved, but it does explain why consignments of sugar on the *Chifuku, Washington* and *Cheswald* gave rise to a rather remarkable mass of litigation. Efforts to avoid accepting and/or paying for these sugars have taken several forms: First, suit by the vendee to get back from Lamborn the sale price obtained by him from the banks issuing the irrevocable credits. This case is of that sort, and so were *Wilbur & Sons, Inc.* v. *Lamborn,* 276 Penn., 479, and *Lamborn* v. *Hardie Co.,* 1 Fed. 2d, 679. The second form of attack consisted in a vendee's suing to prevent his own bank paying under its own irrecovable letter of credit. *J. Hungerford Smith Co.* v. *Lamborn,* 200 N. Y. Sup., 292,

and *Williams Ice Cream Co.* v. *Chase, etc. Bank,* 210 A. D., 179, are such cases.

In a third form of litigation Lamborn brought suit against the credit issuing bank, which on varying grounds had refused the promised payment. Such cases are *Lamborn* v. *The Lake Shore, etc. Co.,* 196 A. D., 504, and *National Bank, etc.* v. *Lamborn,* 2 Fed., 2d, 23. In every instance except the last Lamborn has prevailed.

In that case the credit, according to the report, required "shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia." There, as here, the sugar tendered f.o.b. Philadelphia was *ex West Cheswald* but as that steamer had originally sailed from Java for New York and been diverted to Philadelphia by radio, the Fourth Circuit held that the credit-giving bank was justified in refusing payment because there had been no shipment from Java to Philadelphia.

There is also a report of the present litigation, on plaintiff's motion to strike out certain defenses. (*Matthew Smith, etc. Co.* v. *Lamborn,* 276 Fed., 325.)

On the present writs we are urged *first* to construe the contract between vendor and vendee as the Fourth Circuit did that between vendor and bank, and *second* to sustain the contention pleaded below by the plaintiffs-in-error, *i. e.,* that after shipment of sugar satisfying shipment on the *Chifuku,* Lamborn was powerless to tender sugars shipped on the *Cheswald.*

As to the first point we could not yield to the argument even if we wished to. This is not a suit between the vendor and the credit-issuing bank; the existence of that credit is immaterial to the present action. We note, how-

ever, that the credit letter in this record does not contain the proviso above quoted from the Fourth Circuit case; and even if it were there we could not consider it as a defense, because it was not pleaded nor suggested as a reason for Smith's refusing the sugar.

This suit does not rest on the credit in any way, it is not denied that Lamborn was entitled to his money *under the credit*, but he is alleged to have gotten it only after he had broken his sales contract. There were two quite distinct contracts, one for the sale and one for payment by another person. As was said in *Lamborn* v. *Lake Shore, &c. Co., supra* (at p. 606):

> "The authorities are uniform to the effect that this letter of credit constitutes the sole contract with the shipper, and that the bank issuing the letter of credit has no concern with any question which may arise between the vendor and vendee of the merchandise for the purchase price for which the letter of credit was issued."

Consequently we are not required to express assent or disagreement with the opinion of the Fourth Circuit.

On the other question, the single issue arising on the pleading, we are of opinion that Lamborn had good right to tender sugar *ex West Cheswald*, and have little to add to the opinion of HAND, J. in 276 Fed., 325.

The sale contract was mercantile, is to be construed according to the intent of the parties, and we must discover by the language used what warranties, or conditions precedent were created. (*Dorrance* v. *Barber*, 262 Fed., 489.)

There was no warranty that the same steamer would carry Smith's sugar all the way from Java to Philadel-

phia; by express agreement it might have gone on several vessels, and by reasonable construction been forwarded by another steamer from an intermediate port; *e. g.* the *Chifuku* could have transshipped at Port Said. (*Harrison* v. *Fortlage*, 161 U. S., 57.)

The naming of the *Chifuku* as the carrying vessel bore no resemblance to the naming of a vessel to fulfil a charter party, where the vessel itself was the subject matter of agreement. *Texas Co.* v. *Hogarth, &c. Co.*, 256 U. S. 619, has no application.

In short the provision of the sales contract "names * * * of steamers to be declared later," was for the seller's benefit only, and he could waive it. The cases were cited below, but see also *Borrowman* v. *Free*, 4 Q. B. D., 500.

Reduced to its lowest terms Smith Company was entitled to a certain quantity of Java sugar, f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled.

Judgment affirmed with costs.

Exhibit "C."

Decided Oct. 21, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

NATIONAL BANK OF COMMERCE OF NORFOLK,
Plaintiff-in-Error,
v.
ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, VICTOR R. HESS, N. NELSON KEEN, B. WHEELER DYER and WILLIAM V. WOOD, partners trading and doing business as LAMBORN AND COMPANY,
Defendants-in-Error.

ROSE, Circuit Judge:

This is another sugar case. Those concerned in the transactions out of which it arose will be referred to as the Seller, the Buyer and the Bank. Only the first and last of these are parties to this litigation. The Seller was plaintiff below and is defendant in error here. It is a partnership trading as Lamborn & Co. and is composed of nearly a dozen persons, everyone of whom is a citizen of some other state than Virginia.

On the 23rd of April 1920, it entered into a written contract with the Buyer, Southgate & Co. of Norfolk, Virginia, by the terms of which it sold the latter 1,000 bags of Java White Sugar of about 224 pounds to the bag,

10% more or less at 22c. per pound, duty paid f.o.b. cars Philadelphia, landed weights. The sugar was to be shipped during August/September at the option of Seller from Java, by steamer or steamers were to be declared later. Should the steamer or steamers declared against the contract fail to arrive at the port of destination for any cause, Seller was to be relieved of responsibiilty under the contract. It was further provided that in case there was damage to the sugars in transit to Philadelphia preventing Seller from making full delivery, Seller was to deliver to each purchaser of sugar aboard that steamer a proportionate part of the sound packages. Payment was to be made net cash on presentation of sight draft with invoice and bill of lading attached. Buyer was to open within five days, confirmed irrevocable letter of credit in favor of Seller for the full invoice value of the 1,000 bags. If unforeseen circumstances, such as embargoes, Government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc., prevented shipment within the time specified, the Buyer had the option of cancelling the portion of the contract affected by the delay or taking the sugar so affected for later shipment without claiming damages. The Buyer's decision was to be given immediately upon advice of the Seller that delay had occurred. In the event of such cancellation by the Buyer, the Seller was to be under no further obligation under the contract.

A letter of credit was promptly opened but because it was not worded in some respects as the Buyer and Seller desired, it was withdrawn and another dated May 11, 1920, was issued in its place by the Bank, the National Bank of Commerce of Norfolk, Virginia. It is upon this latter document that the Seller is here seeking to recover from

the Bank. It was for $53,123.84, a sum arrived at by figuring what the Buyer would owe the Seller if the amount of sugar exceeded by the permissible 10% the 1,000 bags at 224 pounds each. In that event there would be delivered 246,000 pounds of sugar which at 22c. per pound would foot up $54,208.00, from which by the terms of the contract, 2% or $1,084.16 would be deducted leaving the amount for which letter of credit was issued. Apparently when the letter was received by the Seller it did not notice that it contained the provision that before payment could be demanded by the Seller, the latter must present to the Bank or rather to the Bankers Trust Co. of New York through which the credit was made payable, a sight draft with invoice and copy of ocean bill of lading covering shipment Java to Philadelphia and order notify bill of lading, the latter bill of course being the one to be issued by the railway carrier to whom in accordance with the contract the sugar was to be delivered f.o.b. cars at Philadelphia. In the contract the Seller had bargained to attach to the draft only the invoice and bill of lading by which it understood the railroad bill. When the Seller realized that the letter of credit required it to present with its draft a copy of the ocean bill of lading as well, it took up the matter with the other parties, writing on the 10th of June that the sugar was being shipped from Java in cargoes of thousands of tons as each cargo would include the sugars intended for a number of different purchasers, it would be impracticable to furnish to each of these a copy of the ocean bill of lading. Some correspondence ensued and finally on the 15th of July, the Bank notified the Seller that it had been authorized by the Buyer to eliminate the copy of the ocean bill of lading

covering shipment from Java to Philadelphia. It added that all other terms and conditions in the credit were to remain as heretofore. One of these other terms which consequently was unchanged was that which was headed "Shipment" and which reads as follows: "Shipment to be made during August/September 1920 at option of the Sellers from Java by steamer or steamers to Philadelphia." When in December the sugars arrived in Philadelphia and were put upon the cars and the Seller's draft was presented, the Bank refused payment. It says that it was entitled to do so because the sugars were not shipped from Java to Philadelphia.

There is no dispute as to facts. The controversy is as to the legal effect of that which admittedly took place. On the 30th of August, the Seller had notified the Buyer that the sugars were going forward by the *Chifuku Maru* or the *Washington Maru* or substitutes. Nearly a month later and within one day of the expiration of the time during which the Seller was bound to ship the sugar from Java, it wrote the Buyer that the *Chifuku Maru* was carrying the latter's sugars and was due to arrive the latter part of October. On November 10th, it again wrote the Buyer that the sugars were to arrive in Philadelphia the last half of November on the Steamship *Chifuku Maru.* There was shipped in that steamer from Java to Philadelphia, a full cargo of sugar including much more than the amount which the Seller had contracted to deliver to the Buyer. Unfortunately the Steamship developed engine trouble of so serious a character, that it became evident that it might be forced to remain at Port Said for an indefinite period. The Seller had on board the Steamship *West Cheswald* sugars which before the end of September had been shipped on her from Java to New York. On the 11th of

December that vessel was within about three days sail of her destination. The price of sugar had by that time fallen to a fraction of that which the Buyer had agreed to pay and doubtless the Seller was anxious that there should be no departure on its part from the terms of the contract, and it might be that the *Chifuku Maru* would never get to Philadelphia. It occurred to the Seller that the *West Cheswald* might be diverted from New York to Philadelphia and accordingly on the 11th the Seller took up the matter with the agents of that ship and asked whether such agents would consider the sending of her to Philadelphia instead of to New York. The reply was it would all depend on how the Seller's sugars were stored. A radiogram was thereupon sent to the master of the ship directing him to radio immediately amount general cargo and sugar aboard, how stored, and if Lamborn's sugar could be discharged without moving other cargo. He replied that the Lamborn's sugar would be available without moving other cargo and must be discharged first, and added the ship was due to arrive about December 14th. At the time the ship was somewhere in the neighborhood of the Bermudas. The shipping Board which was the owner of the *West Cheswald* was communicated with and asked if it would consider sending that ship to Philadelphia instead of New York. The Board authorized the diversion of the steamer to Philadelphia at an additional freight charge of $1.00 per ton and on the afternoon of December 13, the Seller accepted the Shipping Board's terms and agreed to pay $3,572.00 the extra freight on its sugars. Thereupon, on the 13th, the *West Cheswald* by radio was directed to proceed to Philadelphia. The ship reached the Delaware breakwater

by midnight of the 14th and apparently arrived at Philadelphia a few hours later.

The Courts, State and Federal, in at least four other cases, have had before them tenders, by this Seller under similar contracts to that here involved, of sugars brought by the *West Cheswald* to Philadelphia. Wilbur *v.* Lamborn 276 Pa. State 479, Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn, 276 Fed. 325, Smith *v.* Lamborn 200 N. Y. Supp. 292, Williams Ice Cream Co. *v.* Chase National Bank 199 N. Y. Supp. 314, affirmed by the Appellate Division of the Supreme Court of New York for the First Department in June of this year, in an opinion which we have seen but which has not yet been reported. In every one of these as well as below in the instant case, it was held the buyers were bound to receive and pay for the sugars. In most of them the question principally discussed was whether the Seller had the right under the contract to declare the *West Cheswald* as and when it did. The Buyers contended that letters of August 30, September 29 and November 10 from the Seller, identical in phraseology with those of the same dates above referred to, amounted to a final declaration of the *Chifuku Maru* which could not be subsequently changed without the consent of both Buyer and Seller. That particular defense is not open to the Buyer in the instant case because its letter of credit contains no requirement for a declaration. Apparently the letters of credit procured by the buyers in the other litigated cases were equally silent on that point, a circumstance which doubtless explains why in them the controversy took the form either of an application by a buyer for an injunction to prevent payment on the letter of credit or of a suit by the buyer against the seller to recover what the latter had received upon

such letter. The right of the Seller to declare the *West Cheswald* when and as it did was sustained by every one of the Courts which felt called upon to pass upon that question. It is not before us and we are not called upon to say anything about it.

In two of the cases, namely, Smith *v.* Lamborn, *supra* and Wilbur *v.* Lamborn, *supra*, as well as by the learned Judge below in the one now at bar, something was said as to the contention upon which we are required to pass, namely, whether the "shipment" of sugars on the *West Cheswald* was made "from Java by steamer or steamers to Philadelphia." In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority.

In Williams Ice Cream Co. Inc. *v.* Chase National Bank, the learned Judge in the Court of the first instance who heard the case thought it sufficient to say "the plaintiff urges the sugar was not a shipment from Java to Philadelphia, but to New York. In other words the shipment is not the course that a designated vessel takes but the course it was intended it should take. This refinement it seems to me is more one of sophistry than reason and carries with it a failure of conviction." In the Appellate Division this particular point is not noticed at all. The Supreme Court of Pennsylvania in Wilbur *v.* Lamborn was almost as brief. "Some point is made of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the contract. Plaintiff was concerned only with the delivery of the merchandise and that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from

Java to Philadelphia. These contracts did not say that the sugar shall be shipped by continuous voyage from the place of shipment to the destination, what they provide is that the shipment shall be from Java by steamer or steamers to Philadelphia. Even if they did so provide, we might not be prepared to hold—under the facts here appearing that the voyage was not in reality a continuous one—although the first destination of the ship was New York—that this latter circumstance would avoid the contract." From the report of the case it appears that Filley *v.* Pope 115 U. S. 213 was cited by counsel but is not referred to by the Court. In the instant case the learned Judge below said "the letter of credit is complied with it seems to me by the shipment within a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time from the inception of the voyage, an intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be in compliance with the contract. It would be all that reason and fair play and justice would require. I was very much interested in the Supreme Court case and of course if it is parallel with this, I shall have to follow it and be bound by it, but I do see a difference in a shipment from Leith and a shipment from Glasgow. The delivery of this shipment to New York would have been unquestionably a non-compliance with the contract which would have avoided this letter of credit so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract notwithstanding the precise quantity and the

precise quality of sugar was furnished but to say that although the exact terms of the contract were complied with because it was not the purpose or not the intention or not the arrangment that what was done should be done at the beginning vitiated this guarantee, it seems to me is going further than I think I have the right to go." The Supreme Court case referred to in the above quotation was of course Filley *v.* Pope, *supra.* In it a Scotch iron master by contract with a resident of St. Louis, sold the latter 500 tons of pig iron and undertook that shipment should be from Glasgow as soon as possible. It appeared that the seller's iron works were about equally distant from Glasgow on the west coast of Scotland and from Leith on the east, and that in the ordinary course of trade, shipments were made indifferently from either. At the time of the sale, no vessel from Glasgow was immediately available and the only ship by which prompt transportation was possible was about to leave Leith. The seller accordingly put the iron upon her and it arrived at its destination earlier than it could possibly have done had it gone from Glasgow. The trial Court held that the provision "That the iron was to be shipped from Glasgow was not a material provision," "that the purpose of the contract was the sale" of certain quantity of iron to be delivered at a certain place and that the fact "that it was shipped from Leith instead of Glasgow was not material to the rights of the parties." That point of view is in substance the same as that which has commended itself to the Courts which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Philadelphia, it made no difference that when the ship-

ment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York. In Filley *v.* Pope, however, the Supreme Court held that the contract was a mercantile one, as that now at bar is, and that in such a contract "a statement descriptive of the subject matter or some material incident such as time or place of shipment is ordinarily to be regarded as a warranty or a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

Referring to the case of Norrington *v.* Wright, 115 U. S. 188, decided on the same day, Mr. Justice GRAY said that "the provision in that case related to the time; in this it relates to the place of shipment," as in the case now at our bar it related to the place to which the shipment was to be made. The Supreme Court said it was not "merely 500 tons of iron of a certain quality" that was sold, nor was "it such iron to be shipped as soon as possible from any Scottish port or ports, but it 'was' iron of that quality to be shipped from the particular port of Glasgow as soon as possible." "The Court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow, instead of using the more general phrase of shipment from Scotland or merely shipment without naming any place, but it is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment nor does the buyer agree to accept iron shipped via any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in pro-

curing the voyage from Glasgow to New Orleans, but he does not take the risk of delay or of sea perils which may occur in the course of a different voyage from Leith to the same destination."

"One or two illustrations may help to make this clear. If the sellers had shipped the iron at the first opportunity from Glasgow, the buyer could not have refused to accept it even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in iron during the voyage by reason of the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market but a policy of insurance on the iron for a voyage from Glasgow would not cover a voyage from Leith." Just as in this case although the title to the sugar was not to pass until its delivery f.o.b. cars Philadelphia, the buyer had an insurable interest in it and had the sugar market continued to advance, he might well have desired to insure the gain he would make from his contract, and insurance affected on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York. Murray *v.* Columbian Insurance Co. 4 Johns. 443.

In the case before us the parties had definitely bargained for a "shipment" "from Java *to Philadelphia*" as in Filley *v.* Pope they did for a shipment "*from Glasgow.*" Some of the Courts which have upheld the contention of the Seller in cases arising out of sugars tendered from the *West Chesuald* have done so because in their views whether the shipment was to Philadelphia depended on the voyage the ship actually made and not upon the one she started out to make and for which she issued her

bills of lading. If they are right, they were of course justified in holding that Filley *v.* Pope was not a controlling authority. The Bank, however, argues that in mercantile contracts such as this the word "shipment" has a definite meaning. When it is used in connection with the time or place at or the destination to which it is to be made, it has reference to the conditions which existed at and before the sailing of the ship and that therefore the sugar tendered under the letter of credit was a shipment not "to Philadelphia" but to "New York." If that be so, Filley *v.* Pope is necessarily decisive of the controversy.

In Norrington *v.* Wright, *supra*, the Supreme Court cited with approval Bowes *v.* Shand, 2 App. Cases 455. In that case a contract was made in London, for the sale of 6,000 tons of Madras rice to be shipped at Madras or coast during the months of March and/or April, 1874, per *Rajah of Cochin*. The 6,000 tons filled 8,200 bags of which 7,120 were put on board and bills of lading signed in February and for the rest, consisting of 1,030 put on board in February and 50 in March, the bill of lading was signed in March. The House of Lords held the seller could not require the buyer to accept the rice because the meaning of the contract, as apparent upon its face, was that all of the rice must be put on board in March and April or in one of those months. The shipment took place when the rice was put on board the ship and what was then done, determined the time and character of the shipment, precisely as whether the shipment of the sugar in the case at bar was made to New York or Philadelphia was necessarily determined when the sugar being on board the ship, the bills of lading for it were issued.

In answer to a suggestion similar to one which seems to have had much weight with some of the Courts which have considered the contract now in controversy, viz., that it made no difference to the Buyer whether the sugar was originally consigned to New York or to Philadelphia, Lord Chancellor CAIRNS said, "It does not appear to me to be a question for your Lordships or for any Court to consider whether this is a contract which bears upon the face of it some reason, some explanation why it was made in that from and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing in their contracts stipulations to which they do not attach some value and importance. If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace that literal meaning to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that it is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices have dropped. The non-fulfillment of any term of the contract is a means by which a purchaser is able to get rid of the contract when prices have dropped but that is no reason why a term which is in a contract should not be fulfilled." In the same case that eminent authority on the law of sale, Lord BLACKBURN said "if the description of the article tendered is different in any respect it is not the article

bargained for and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras; probably equally good rice might have been shipped in February as was shipped in April, and I dare say, equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*, but the parties have chosen, for reasons best known to themselves, to say we bargained to take rice shipped in this particular region, at that particular time, on board that particular ship and before defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article they have bargained for otherwise they are not bound to take it."

The same principle was applied by Lord Chief Justice RUSSELL in Ashmore & Son *v.* Cox & Co. L. R. 1899, 1 Q. B. 436. In that case 250 bales of Manila hemp were sold, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers, direct or indirect to London between May 1 and July 31. No hemp was shipped by the seller by sailer or sailers, nor during the time limited, but on September 15, it did ship 250 bales of Manila hemp by a steamship which was expected to arrive and did arrive in London about the same time as the sailing ship would have arrived, had it sailed July 31. It was held that the date of shipment and that it was to be made by a sailer or sailers was binding. In that case it was urged precisely as it has been at bar, that all the buyer was interested in was that goods of the kind

and quality he had bargained for should arrive at the time and place originally contemplated.

Few men have been more deeply learned in mercantile law than Mr. Justice SCRUTTON. In Landauer *v.* Craven & Speed Bros. L. R. 1912 2 K. B. 94, he passed upon a case in which 500 bales of Manila hemp had been sold for delivery at London. The terms of the contract gave much liberty to the seller and by so doing indicated that the buyer was chiefly interested in the ultimate delivery of the hemp to him. It was agreed the shipment might be made from any recognized shipping port or ports in the Philippine Islands or from Hong Kong or Singapore at any time within a three months interval between October 1 and December 31. The shipment might be direct or indirect. It was in fact made from Manila in due season but on a bill of lading which called for delivery at Hong Kong. At the last named port, subsequently to December 31, the hemp was put upon another ship and there was issued for it a new bill of lading from Hong Kong to London. Mr. Justice SCRUTTON held that the seller was bound within the time named in the contract to ship at the port of shipment goods of the description contained in the contract and on shipment to procure a contract of affreightment under which the goods would be delivered at the destination contemplated by the contract. He said if when the seller ships goods c.i.f. London, he has no contract for carriage to London but only an intention to make one, he cannot forward this and tender an intention to the buyer. He further said that a seller C.I.F. must ship his goods under a contract for conveyance to the port of destination which can be transferred and not under a contract for part of the way and to take another which cannot be transferred.

Now it is true as it is pointed out by the learned counsel for the seller that the contract here is not a C.I.F. contract but it is one under which the Buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle. Moreover, at all events, Landauer *v.* Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson *v.* Hamel & Horley L. R. 1922 2 App. Cases 36.

We in the past have had more than one occasion to hold that in mercantile contracts the Courts must give effect to every term in the bargain the parties have chosen to make and are not at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in The Manhattan 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came in another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was brought in the substitute. From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the *West Cheswald,* it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchasers from escaping from a bad bargain by taking advantage of a variation from the terms for which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with

contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice GRAY in this country and from Lords CAIRNS and BLACKBURN in England. Our examinations of the cases which in this country and across the water have put a definite interpretation on the meaning of the word "shipment" as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from it and is governed by what the Supreme Court there said.

It follows that the learned Court below erred in rejecting the prayer of the defendant for a directed verdict in its favor and in consequence, the judgment below must be reversed and the case remanded for a new trial.

Reversed.

Exhibit "D."

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 2452.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE C. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, surviving partners of the copartnership Firm of LAMBORN & COMPANY,
Plaintiffs-in-Error,

versus

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States,
Defendant-in-Error.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued January 25, 1926. Decided October 19, 1926).

Before—WADDILL, ROSE and PARKER, Circuit Judges.

LOUIS O. VAN DOREN (Baird, White & Lanning; Edward R. Baird, Jr.; H. G. Connor, Jr. and Van Doren, Conklin & McNevin on brief) for Plaintiffs-in-Error, and TAZEWELL TAYLOR for Defendant-in-Error.

ROSE, Circuit Judge:

This is the second time this case has been here. What has been said (2F) (2d) (23) need not be repeated.

At the new trial the learned District Judge thought that the plaintiffs had offered no admissible testimony strengthening the case once held insufficient and he directed a verdict for the defendant.

The plaintiffs assign seventeen errors which resolve themselves into three contentions.

ALLEGED WAIVER BY THE DEFENDANT.

The plaintiffs say that defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The claim of the plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while plaintiffs insist that defendant may not amend or supplement its out of Court statement of its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the plaintiffs treated the defense in question as properly before the

Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made.

EVIDENCE AS TO CUSTOM OF TRADE.

After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things

> "The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a case in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract and having that determina-

tion before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, does not require the aid of custom to interpret it, and would therefore have to be overruled and refused admission on that account."

We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question.

EVIDENCE AS TO UNDERWRITING PRACTICE.

The refusal of the Court to receive proffered evidence as to underwriting practices is not open to attack here. That testimony did not bear upon any issue in the case, except in the most remote way. It was at best directed to a purely collateral matter. Its exclusion could not have prejudiced the plaintiffs and was well within the discretion of the trial Judge.

AFFIRMED.

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POINT TWO.—Both State and Federal Courts, including the Second Circuit Court of Appeals, have construed Lamborn & Company's obligations under this shipment clause in accordance with the construction urged by us in Point One; and all these Courts have held that delivery of the commodity by Lamborn & Company from the Steamship *West Cheswald* was a good delivery under that clause 45

POINT THREE.—The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court 54

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, *et al.*, etc.,

Plaintiffs-Petitioners,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA,

Defendant-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, by Order Allowing the Certiorari, filed February 28, 1927.

BRIEF FOR PLAINTIFFS-PETITIONERS.

Statement of the Case.

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, granted by order filed February 28, 1927, on the petition of Arthur H. Lamborn, *et al.*, plaintiffs in the action.

The writ brings up for review a decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered in the above entitled action on October 25, 1926 (15 Fed. [2d] 473) (which decision and judgment adhered to and applied the decision and

judgment of the said Court rendered in the action on October 21, 1924, reported 2 Fed. [2d] 23).

The said decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, rendered on October 21, 1924, Opinion of Circuit Judge ROSE, pages 74 to 86 (2 Fed. [2d] 23) reversed a judgment in favor of the plaintiffs Lamborn & Company upon a verdict directed by the District Court, Hon. D. LAWRENCE GRONER, District Judge, presiding (Rec., pp. 49 and 68), and ordered a new trial of the action.

Upon said new trial, which again came before District Judge GRONER, sitting in Norfolk, Virginia, judgment was rendered for the defendant-respondent herein, The National Bank of Commerce of Norfolk, Virginia, upon a verdict directed by the District Judge (Rec., p. 162), in conformity with the rulings of the Circuit Court of Appeals, Fourth Circuit, upon its reversal of the first judgment.

Plaintiffs-petitioners herein thereupon appealed from the judgment so directed to the United States Circuit Court of Appeals, Fourth Circuit, and the appeal was argued January 25, 1926, before Circuit Judges WADDILL, ROSE and PARKER (Rec., p. 206).

Said second appeal was decided October 19, 1926. The said judgment was affirmed in an opinion, again written by the late Circuit Judge ROSE (see Opinion, pp. 206-209).

In this opinion and decision the United States Circuit Court of Appeals, Fourth Circuit, adhered to and followed its decision and judgment on the first appeal.

This action was brought by the plaintiffs against the defendant Bank to recover damages (*i. e.*, the amount of a certain draft drawn by the plaintiffs) for its refusal to honor its letter of credit.

The letter of credit (Plaintiffs' Exhibit 23, p. 106) was as follows:

"THE NATIONAL BANK OF COMMERCE.

Norfolk, Virginia, May 11, 1920.

LETTER OF CREDIT No. 105.

Lamborn & Company,
132 Front St.,
New York.

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by.	T. S. Southgate & Company, Norfolk, Va.
In Favor of.	Lamborn & Company, 132 Front St., New York.
Amount.	Fifty three thousand, One Hundred twenty-three Dollars and eighty-four cents (53,123.84).
Covering.	1000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugars at 22 cents per pound, less 2% duty paid f.o.b. cars, Philadelphia, Pa., landed weights.
Documents.	Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.
Shipment.	Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in Force. January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, communicate with us before making ship-

ment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly,

(Signed) A. E. WHARTON,
Assistant Cashier."

Subsequent to its issue, this letter of credit was modified so as to eliminate therefrom the requirement contained in Paragraph entitled "documents," viz.:

"And copy of Ocean Bill of Lading covering shipment Java to Philadelphia,"

so that as amended the said paragraph read:

"Documents. Sight draft with invoice and order notify bill of lading attached."

(Plaintiffs' Exhibit 27, p. 107; Plaintiffs' Exhibit 47, p. 108.)

This letter of credit, payable at the office of the Bankers Trust Company, New York City, was issued by the defendant pursuant to a contract of purchase and sale between Lamborn & Company and T. S. Southgate & Company of Norfolk, Virginia (Plaintiffs' Exhibit X, p. 112 Rec.).

In performance of said contract and of the letter of credit in suit, as well as in performance of a number of other contracts of purchase and sale with other purchasers and letters of credit posted by other purchasers, Lamborn & Company caused to be shipped from Java in September, 1920 about 34,000 bags of Java White Sugar upon the S. S. *West Cheswald*, about 40,000 bags of Java White Sugar upon the S. S. *Chifuku Maru* and about 10,000 bags of Java White Sugar upon the S. S. *Washington Maru*, all of said bags of sugar being of the kind and quality called for in the said contract and in the said letter of credit (Rec., pp. 58, 109-111, 113-116, 119).

Upon shipment of the said sugar on the S. S. *West Cheswald* the authorized agents of said vessel in Java issued an ocean bill of lading therefor dated September 30th, 1920 (Plaintiffs' Exhibit 8, p. 114), which said ocean bill of lading contained the following notation:

> "Steamship West Cheswald, Port of Discharge New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York" (Rec., p. 116).

Lamborn & Company, having previously declared to Southgate & Company, as provided in said contract, the S. S. *Chifuku Maru* and the S. S. *Washington Maru* or substitutes, on December 13th, 1920, declared in substitution the S. S. *West Cheswald* (Plaintiffs' Exhibit 49, p. 121; Plaintiffs' Exhibit 50, p. 121; Plaintiffs' Exhibit 51, p. 122; Plaintiffs' Exhibit 52, p. 122 Rec.).

The reason for such substitution was certain information received by Lamborn & Company to the effect that the S. S. *Chifuku Maru* had met with an accident to her machinery which would delay her arrival (Rec., pp. 124-127).

In order to make delivery to Southgate & Company, Lamborn & Company caused the S. S. *West Cheswald* to be intercepted by radio, when two or three days off the Atlantic Coast, and to proceed to Philadelphia, Pa., instead of to New York, and there discharge her cargo (Rec., pp. 128-133).

The S. S. *West Cheswald* arrived at Philadelphia on or about December 16th, 1920, and unloaded the Java White Sugar consigned to Lamborn & Company; 1,000 bags of said sugar in good order and condition were selected, the landed weights taken, the duty paid thereon, and loaded free on board railroad cars at Philadelphia, and a railroad bill of lading issued therefor to the order of

Lamborn & Company, Norfolk, Va., notify T. S. Southgate & Company, Norfolk, Va. (Plaintiffs' Exhibit 16-A, p. 137).

On or about December 23rd, 1920, Lamborn & Company presented to the Bankers Trust Company in New York, their draft drawn under the said letter of credit for $48,009.81, together with invoices in duplicate, the said railroad bill of lading endorsed by Lamborn & Company in blank, weight certificate, and an affidavit of N. Nelson Keen, verified December 23rd, 1920, certifying that the sugar had been unloaded from the S. S. *West Cheswald* under ocean bills of lading dated Samarang, Java, September 30, 1920 (Rec., p. 134; Plaintiffs' Exhibits 18, 19, 20, 20-A, 21, 16-A, 17-A, pp. 134-137).

On said date there was an injunction in force procured by Southgate & Company restraining Lamborn & Company from collecting drafts drawn against the said letter of credit (Rec., p. 140).

Upon said injunction being vacated, and on or about January 6th, 1921, the Bankers Trust Company, acting upon the instructions of the defendant (Plaintiffs' Exhibit 36, p. 143; Exhibit 225, p. 145; Exhibit 228, p. 146), refused to pay the said draft, and on or about January 7th said draft was duly protested (Plaintiffs' Exhibit 30, p. 147).

At the conclusion of the plaintiffs' evidence, District Judge GRONER denied defendant's motion for a directed verdict (see Opinion, pp. 49 to 53, Rec.).

The defendant Bank then introduced certain documentary evidence, and on resting both plaintiffs and defendant moved for a directed verdict. The Court directed a verdict for the plaintiffs (pp. 67, 68, Rec.).

Defendant National Bank of Commerce of Norfolk appealed to the Circuit Court of Appeals, Fourth Circuit, from the said judgment, which Court reversed the judg-

ment and ordered a new trial, pursuant to the opinion of Circuit Judge ROSE, filed October 21, 1924 (pp. 74 to 86, Rec.; now reported 2 Fed. [2d] 23). Plaintiffs' petition for a rehearing was denied (p. 87, Rec.).

The cause thus went back for a new trial, which was had in Norfolk, Virginia, on June 4th and 5th, 1925, the proceedings whereon are found between pages 89 and 204, Record.

On this Second Trial certain additional evidence was offered by the plaintiffs and received; and certain additional evidence was offered by the plaintiffs and rejected. We make brief reference to both classes thus:

New Facts Brought Out by the Evidence Admitted Upon the Second Trial.

1. On or about December 27th, 1920, the defendant sent to the Bankers Trust Company the following telegram (Plaintiffs' Exhibit 36, p. 143, Rec.):

> "ANSWERING TELEGRAM WE HAVE CONVINCING EVIDENCE THAT SUGARS TENDERED BY LAMBORN WERE NOT SHIPPED FROM JAVA UNTIL OCTOBER SEVENTEENTH MARITIME RECORDS SHOW THAT SHIP ON WHICH LOADED SAILED FROM SAMARANG OCTOBER EIGHTH CALLING AT MASCASSAR THEN BORNEO AND FINALLY BACK TO SAMARANG FROM WHENCE SAILED FOR NEW YORK OCTOBER SEVENTEENTH FURTHER THAT THIS SHIP WAS DIVERTED TO PHILADELPHIA THOUGH ORIGINALLY INTENDED FOR NEW YORK **OUR CREDIT SPECIFICALLY CALLS FOR SHIPMENT FROM JAVA AUGUST OR SEPTEMBER AND LAMBORN'S FAILURE TO COMPLY WITH THIS IMPORTANT REQUIREMENT COMPELS US REFUSE PAYMENT MOREOVER OUR**

CLIENT HAS SHOWN US LETTERS INDICATING THEIR SUGARS LOADED ON STEAMER CHIFUKE MARU WHICH HAS NEVER ARRIVED." (Emphasis ours.)

Mr. Keen, one of the plaintiffs, who had called at the office of the Bankers Trust Company concerning the defendant's refusal to pay (Rec., p. 138), testified that he was not allowed to read the telegram in its entirety but that he saw it in the hands of one of the men at the Bankers Trust Company office. Mr. Keen recalled from reading the telegram at the trial that upon its exhibition to him only the question of clearance was brought up, and that he explained that the Lamborn contract did not covenant as to clearance (Rec., pp. 153-154).

2. On December 29th, 1920, the Bankers Trust Company sent the following night letter or telegram to the National Bank of Commerce at Norfolk (Plaintiffs' Exhibit 221, p. 139 Rec.):

> "Replying your telegram Southgate credit documents tendered by Lamborn in our opinion comply with terms of credit Lamborn have exhibited blading dated Samarang September thirtieth covering sugars per steamer *West Cheswald* out of which delivery to cars at Philadelphia was made which complies with August/September shipment clause your credit Do not know if sailing dates mentioned your wire refer this steamer However this is question of steamer clearance which point is not covered in your credit and must not be confused with date of shipment as indicated by date of blading. If steamer *Chifuku Maru* originally declared by Lamborn no doubt contract with Southgate gives them the right substitute other steamer All points mentioned your telegram are matter of contract between Lamborn and Southgate and do not concern terms your credit which have been complied with Injunction at present prevents Lamborn accepting

payment but similar injunctions easily vacated Unless you wire us to contrary will return documents to Lamborn notifying them you have instructed us as your agents under credit refuse payment. We and our counsel are of opinion Lamborn have strong case against you if payment refused This wire sent for your information and guidance Bankers Trust Company."

3. It will be noted, and we draw attention to the fact, that the Bankers Trust Company never stated to Mr. Keen that the form of the ocean bill of lading of the S. S. *West Cheswald* constituted any objection or irregularity. They had had this document in their possession on the 23rd of December, 1920. On the contrary, knowing its form and contents, the Bankers Trust Company stated in writing that the documents were in order.

4. In the course of a conversation between Mr. Keen, of Lamborn & Company, and Mr. Kent and Mr. Smith, Vice-Presidents of the Bankers Trust Company, on January 6th, 1921, after the injunction had been vacated, there was shown to Mr. Keen a copy of a telegram dated January 6th, 1921, from the Bankers Trust Company to the National Bank of Commerce of Norfolk, Virginia (Plaintiffs' Exhibit 227, p. 146, Rec.), reading as follows:

"JUDGE BURROUGH (error for Burr) HAS VACATED THE ORDER ENJOINING PAYMENT AGAINST PRESENTATION OF DOCUMENTS UNDER YOUR CREDIT ONE HUNDRED FIVE ORDER WILL BE ENTERED TODAY TO THAT EFFECT PLEASE REMIT FUNDS TO COVER AT ONCE AS THE DOCUMENTS ARE IN ORDER AND ANY DELAY IN NOT MEETING PAYMENT WILL BE MOST EMBARRASSING TO YOURSELVES AND OURSELVES."

5. Thereupon Mr. Keen testified as follows (p. 54, Rec.):

"Q. Did the Bankers Trust Company ever say to you that non-payment of this draft was because of the nature of the bill of lading of the cargo of the *West Cheswald?*

"A. No, sir, they did not.

"Q. Did you rely on the stated ground of non-clearance or non-shipment in time, August and/or September, from Java in your subsequent conduct of this matter?

"A. We did.

"Q. Could you have given sugar to the amount of a thousand bags to T. S. Southgate & Company? Could you have shipped F. O. B. cars a thousand bags of this sugar to T. S. Southgate & Company from the cargo of the *Washington Maru?*

"A. We could."

6. The ocean bill of lading of the S. S. *Washington Maru* was offered and received in evidence (Plaintiffs' Exhibit 235, p. 120), dated September 28th, 1920, covering 10,043 bags of sugar and covering transportation from Surabaya (Java) to Philadelphia, the goods being consigned to order notify Lamborn & Company, New York, and the bill of lading having been endorsed by the shipper to the American Foreign Banking Corporation, and by the American Foreign Banking Corporation to Lamborn & Company. The S. S. *Washington Maru arrived* in Philadelphia, Pa., on December 19th, 1920 (Rec., pp. 127-8, 156).

7. Upon Mr. Keen's cross examination, and again upon his redirect examination it was shown that between December 19th and December 26th or 27th, 1920, if Lamborn & Company had been informed by the National Bank of Commerce of Norfolk, Virginia, or by its agent in New York City, the Bankers Trust Company, of the alleged objection to the form of the ocean bill of lading of the S. S. *West Cheswald*, viz.: that at the time of shipment

that vessel was destined for New York or for Port Said, option New York, instead of Philadelphia originally, Lamborn & Company could in fact have delivered between those dates—December 19th to December 27th, 1920—to Southgate & Company the sugar from the S. S. *Washington Maru*, and could have presented to the Bankers Trust Company, prior to the expiration of the letter of credit, railroad bills of lading covering delivery to Southgate & Company of sugar from that vessel (Rec., pp. 154-157).

8. Thus, as the record now showed, the only objections which the defendant ever stated as a ground for its refusal to pay this draft during the life of the letter of credit and prior to action brought, were:

(a) Redeclaration of steamers, raised by Southgate & Co. (but the defendant bank's letter of credit contained no declaration clause), and

(b) Non-clearance of the steamer *West Cheswald*.

This was demonstrated beyond question by certain correspondence between the defendant and the Bankers Trust Co., which was offered in evidence for the first time upon the second trial.

These letters are:

> Plaintiffs' Exhibit 229, page 148, Rec. (Bankers Trust Company to defendant);
> Plaintiffs' Exhibit 230, page 151, Rec. (Defendant to Bankers Trust Company).

This latter letter dated January 22nd, 1921, from the defendant to the Bankers Trust Company, written while the letter of credit was still in force, is therefore highly significant as demonstrating the defendant's attitude at that time. We quote the following extract appearing on page 151:

"In order that you may clearly understand our position in regard to this particular credit, permit me to say:

"(1) This credit letter was made irrevocable only upon full compliance with the conditions of same.

"(2) Because there were conditions to be complied with, the instrument was non-negotiable. We were, therefore, advised by you that your interest in same was nominal or that of agent only.

"(3) In support of the client's contention that conditions of credit had not been complied with, there was submitted to officers and counsel of this bank five different shifting sets of declarations of shipment of this product, copies of which are herewith enclosed to you.

"(4) In connection with these papers unmistakable government evidence was also exhibited that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter.

"We submit, therefore, gentlemen, that there was justifiable evidence before us to warrant the action taken." (Emphasis ours.)

Then follow as annexes to this letter, copies of five notices from Lamborn & Company to Southgate & Company dated respectively August 30th, 1920, September 29th, 1920, November 10th, 1920, December 13th, 1920, and December 16th, 1920, which we set forth in full:

Letter dated August 30, 1920 (Plaintiffs' Exhibit 49, p. 121):

"We hereby declare that the steamships *Chifuku Maru* and *Washington Maru* or substitute will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920."

Letter dated September 29, 1920 (Plaintiffs' Exhibit 50, p. 121):

"We have received advices that the S/S *Chifuku Maru* carrying your Javas purchased under contract dated April 23, 1920, sailed from Java Aug. 22d, and is due to arrive the latter part of October."

Letter dated November 10, 1920 (Plaintiffs' Exhibit 51, p. 122):

"On Sept. 29th, we notified you that the steamer *Chifuku Maru* was due to arrive the latter part of October.

"We are now in receipt of advices to the effect that this steamer is not expected to arrive before the last half of November."

Letter dated December 13, 1920 (Plaintiffs' Exhibit 52, p. 122):

"On November 10, 1920, we advised you that the steamer *Chifuku Maru*, previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of Nov. 1920, had been unavoidably delayed owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

"In consideration of the above mentioned circumstances, we hereby declare the steamer *West Cheswald*, carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week."

Letter dated December 16, 1920 (Plaintiffs' Exhibit 230, p. 153, Rec.):

"Please be advised that the S/S *West Cheswald* is now in the Port of Philadelphia, with sugars to apply against your contract AB-522, dated April 23, 1920."

Evidence Offered for the First Time Upon the Second Trial, but Which was Excluded by the Court.

A. As to custom or trade meaning.

In support of the allegations of the plaintiffs' amended notice of motion for judgment, plaintiffs offered in evidence the depositions taken in New York City of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker, all gentlemen of experience in the sugar business, and connected with concerns of national reputation, which were the most active in the importation of Java White Sugar in 1920.

The depositions of these witnesses, which are found in the record, pages 164-175, showed that in 1920 there was a long established and generally recognized custom among importers and buyers and sellers of imported sugar wherein and whereby the expression:

> "F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by steamer or steamers to Philadelphia, Pa., and that delivery to the purchaser was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyer at Philadelphia, Pa.; and that said words did not mean or require that the vessel or the goods carried thereon be destined for Philadelphia, Pa., at the time of shipment.

The testimony of these witnesses, if admitted, would have shown that in making delivery to Southgate & Company of sugar shipped on board the S. S. *West Cheswald* under the bill of lading in evidence, Lamborn & Company were doing precisely what their contract with Southgate & Company and the defendant's letter of credit called for, as the terms in such contract and letter of credit were understood by the persons engaged in that trade.

This evidence was excluded by the Court for the reason stated by it in granting the defendant's motion to strike out the allegations of the amended notice of motion for judgment, in support of which this evidence was offered (Rec., pp. 103-106 and p. 160).

B. As to T. S. Southgate & Company's alleged right of insurance under this contract.

United States Circuit Court of Appeals, Fourth Circuit, in its opinion on the first appeal, said (2 Fed. [2d], 23, at p. 27):

> "* * * just as in this case, although the title to the sugar was not to pass until its delivery f. o. b. cars Philadelphia, the buyer had an insurable interest in it, and, had the sugar market continued to advance, he might well have desired to insure *the gain he would make from his contract,* and insurance effected *on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York*" (Rec., p. 82). (Italics ours.)

We have italicized the foregoing lines so as to show that consideration of the subject-matter of insurance of profits or "gain," became at once and was turned into the very different question of the insurance of sugar aboard a certain ship or ships; whereas we contend that the purchaser's *insurance of profits* under a purchase and sale contract is and always has been a totally different thing from *insurance of the goods themselves* belonging

to the vendor. To establish this distinction of fact in the theory and practice of marine insurance, we adduced in the form of a deposition, the testimony of Richard Jones, to which we now beg leave to refer.

This deposition (pp. 176-200) showed that under a contract of purchase and sale such as existed between Southgate & Company and the plaintiffs, whereby goods were to be shipped from a foreign land during a certain period of time and placed duty paid, free on board cars in an American port, the purchaser had a right to take out insurance on profits the moment that this contract was made; that such insurance was provided for by settled forms, issued pursuant to the rules of maritime insurance brokers, adopted by the Board of Underwriters of New York, following the London Institute cargo clauses which had been in effect for a great number of years; that those forms provided for substitution of steamers—naming a new steamer from time to time; for diversion of steamers carrying the goods to be delivered to the purchaser; that a form of binder covering insurance of profits entitled "Underwriters and Brokers Emergency Agreement," contained clauses expressly providing for renaming steamers and for the diversion of a steamer (see form of binder printed at pp. 181-185, attached to Mr. Jones' deposition); that in respect to Southgate & Company's contract, if Southgate had taken out insurance of profits thereunder, the substitution of the *West Cheswald* for the *Chifuku Maru* would have occasioned no prejudice to such insurance, nor would the diversion of the *West Cheswald* to Philadelphia when bound for New York off the Atlantic Coast have been anything more than a mere matter to report to the underwriters; that indeed the underwriters would have welcomed such a substitution or diversion of the *West Cheswald*, a few hundred miles off the New

Jersey coast, in the place of a steamer that was delayed by an accident at Port Said.

The Trial Court, however, excluded this evidence (p. 162).

To the exclusion of the depositions of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker as to custom or trade meaning, and the deposition of Richard Jones as to the theory and practice of insurance of profits under the contract between Southgate & Company and the plaintiffs, the plaintiffs excepted (pp. 160 and 162).

Upon the second trial District Judge GRONER feeling constrained by the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, reversing the first judgment and ordering a new trial, now directed a verdict for the defendant Bank, respondent herein. His opinion is found on pages 162 to 164, Record.

The plaintiffs appealed from the judgment entered on said direction to the United States Circuit Court of Appeals, Fourth Circuit, where the appeal was argued January 25, 1926, and the judgment was affirmed by opinion and decision handed down October 19, 1926, to be found on pages 206, 207, 208 and 209, Record. The judgment of affirmance was dated and filed October 25, 1926 (p. 209). And on November 26, 1926, the mandate of the said Circuit Court of Appeals was issued to the United States District Court at Norfolk, Virginia (p. 209).

Thereafter, by order filed February 28, 1927, upon the petition of the plaintiffs-petitioners herein, this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, bringing the said judgments and the records thereof before this Court for review (p. 210).

POINT ONE.

Lamborn & Company's whole duty under this shipment clause was to cause the commodity to be loaded on board a steamer or steamers at a Javan port during August and/or September, 1920, and by such steamer or steamers to be carried in due course to the Port of Philadelphia, there to cause the net landed weight of the commodity to be ascertained, pay the duty and ship the specified quantity to this purchaser free on board railroad cars at Philadelphia (See Letter of Credit, Plaintiffs' Exhibits 1 and 2, pp. 8 and 9, Rec.). Plaintiffs-petitioners performed every one of these acts consecutively and without delay.

The United States Circuit Court of Appeals, Fourth Circuit, in reversing the first judgment misapplied the case of *Filley* v. *Pope*, 115 U. S. 213; and committed the further error of applying the principles of a c. i. f. shipment contract from foreign port to American port to a contract for shipment from a foreign port to an American port and delivery f. o. b. railroad cars at said American port.

The distinction between the two classes of contracts is wide and deep. In the first class of c. i. f. contracts, delivery to the ship at the port of lading is delivery to the purchaser. The goods are his from that moment, the bill of lading is his, the right to insure is his.

In the second class of f. o. b. contracts, delivery to the purchaser is not made until the goods are placed on board railroad cars American port of arrival. When loaded on the ship, the goods are still the sellers, he is responsible for the freight and has the sole right to insure the goods against sea damage or maritime casualty. We beg leave to discuss these errors in their order.

In holding that the case of *Filley* v. *Pope* (*supra*), was a controlling precedent against the judgment rendered in favor of the plaintiffs on the first trial, the Court below applied the judgment rendered in *Filley* v. *Pope* to a totally different contract.

It extended the doctrine of *Filley* v. *Pope* to an element of the contract which was not a condition precedent, not a description of the goods and not a thing as to which the parties had made the supposed covenant or warranty.

We have examined with great care every reported case in the Federal Courts where *Filley* v. *Pope* has been cited. We find it has never been cited in support of a construction like that involved in the decision of the Court below; that it has never been cited as an authority for holding that under an f.o.b. contract American port, there could be *implied* any obligation, warranty or undertaking on the part of the importer as to his own bill of lading or as to the original or primary destination of the ship which might carry his goods.

We submit that unless the alleged breach of the terms of the letter of credit in this case on the part of Lamborn & Company may be put in the same class, falls within the same classification of breaches of contract as the breach of the contract in *Filley* v. *Pope*, the latter case was not a controlling authority.

We are not for one moment contending that performance of a warranty or undertaking in a contract as to the *time* and *place* of shipment is not a condition precedent to recovery by the shipper or vendor. In *Filley* v. *Pope* there was a provision in the contract that the iron should be shipped from Glasgow. This was not done. All that this Court held in *Filley* v. *Pope* in substance and in law was that the words "shipment from Glasgow" were words descriptive of the goods; that said shipment was a condition precedent to performance by the shipper and

so that violation of that clause deprived him of the right to recover. All that was held by the House of Lords in *Bowes* v. *Shand* (2 App. Cases 455), was that the stipulation that the rice should be shipped March and/or April was a clause descriptive of the rice and that shipment of a part of it prior to the said months was a breach of a condition precedent and barred an action to recover the price.

No reported case has imported into a contract such as the Lamborn contract a condition precedent, and no reported case where the contract was silent on the question of direct or indirect voyage or course of the vessel has written into the contract a provision for a direct voyage.

On the contrary Courts have always avoided doing so. For it is equally true and sound that if the Courts have no right to disregard what is written in a contract, they have no power to write into a contract a clause which the parties did not introduce therein.

There is no clause in this letter of credit or in the purchase and sale contract whereby Lamborn & Company covenanted and agreed to any particular form of bill of lading, or to delivery by any particular ship or that the steamer or steamers which they might employ to make delivery should sail upon any designated or described voyage, or that they should touch or not touch at any intermediate port or ports.

The only provision in common in the contract in *Filley* v. *Pope* and the Lamborn contract was a single element found in the words stating and warranting *the place of shipment, Filley* v. *Pope* "shipment from Glasgow" and the Lamborn contract, "shipment from Java." It is a remarkable fact, which we beg leave to impress upon the attention of this Court, that there is no reported case to be found in the English or American Courts which holds where delivery was to be at a designated port of destina-

tion that one of the implied *obligations* of the seller was to procure a certain vessel, obtain a certain kind of bill of lading and see to it that the ship started at once for the ultimate port of destination or delivery, *where the contract was silent on all of these points.*

Here we think is found an indication of the error which has been made in applying the judgment in *Filley* v. *Pope* to the Lamborn contract. If Lamborn & Company had not made shipment from Java, it is not enough to say that they ought not to recover in this case; we can go further and say they would never have brought the case. There would not have been any case.

But all that *Filley* v. *Pope* holds is that by the contract in that case "shipment from Glasgow" was a material description of the goods and that as the seller did not make that shipment he had no suit. That was the judgment in *Filley* v. *Pope.* It has not been applied here to any failure on the part of Lamborn & Company *to ship from Java* when they had agreed to do so. If that had been the fact, then the case of *Filley* v. *Pope* would have been applicable and controlling. But it is true, we submit, that the decision in *Filley* v. *Pope* has been applied to a case where no such breach of contract occurred *and that in order to apply it,* it has been necessary to assume as major premises of the argument that there was a warranty or condition, that it was violated by Lamborn & Company and that said breach was of a condition precedent to performance. So that we claim that the ground and basis upon which *Filley* v. *Pope* has been applied to our contract had to be imported into this case, had to be assumed in this case and that they never existed really in fact.

This brings us to a short description of the nature of the Lamborn contract. What was that contract? It was a sale of sugar to the purchaser to be effected by delivery

to him f. o. b. cars, Philadelphia, U. S. A. Until and unless that delivery was made, the purchaser received no goods, obtained no title and was under no obligation to make payment. No time was fixed for the said delivery f. o. b. railroad cars. The sugar was described as Java white sugar and the contract provided that such sugar should be shipped from Java within a certain time (August or September, 1920) and carried by steamer or steamers to Philadelphia. This contract allowed Lamborn & Company to make said shipment at any time within two stated months, to make it at any port in the Island of Java, and it gave Lamborn & Company the right to transport the sugar from Java by one or a dozen steamers without regard to the quantity carried by any one of the ships. This contract on its face was an agreement that Lamborn & Company might use any number of ships. (*Pennsylvania Sugar Co.* v. *Czarnikow-Rionda Co.*, 245 Fed. 913, *Circuit Court of Appeals, Third Circuit.*)

The letter of credit was simply a replica of the contract with the provision for declaration of steamers omitted.

But this is exactly what we did. We shipped this sugar at Java. We shipped it within the stipulated time. It was loaded on board steamer. That steamer carried it to Philadelphia.

And yet it has been held that we broke this contract. The inquiry is, where was the breach? What part of the written contract and letter of credit did Lamborn & Company violate? What words, what clause, what provision of the contract could be pointed to as having been violated? Obviously none. Therefore, we say that the alleged violation discussed in the opinions below is *one which has to be assumed.* What is the alleged violation? That the bill of lading of the steamship *West Cheswald* read "Port Said, option New York" and that when the

ship sailed from Java she was headed for Port Said and afterward for New York.

But there is nothing in the contract or letter of credit which bound Lamborn & Company to any particular steamer. There is nothing in the contract or letter of credit which bound Lamborn & Company to any particular form of bill of lading on their own sugar. There is nothing in the contract or letter of credit which bound Lamborn & Company so to govern the course of the steamer or steamers carrying the sugar that it or they should make a direct voyage from Java to Philadelphia.

> "Some point is made by the appellant of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as a result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia'; even if they did so provide, we might not be prepared to hold, under the facts here appearing, that the voyage was in reality a continuous one, although the first destination of the ship was New York, that this latter circumstance would avoid the contract."
>
> (Schaffer, J., reading for the Court in *H. O. Wilbur Sons Inc.* v. *Lamborn et al.*, 276 Penn. State, 479.)

In order to spell out a breach of warranty it is perfectly apparent that there must be written into this contract, clauses affecting the steamer, the bill of lading and the voyage of the ship, which were not in the contract

when the parties signed and delivered it. There is nothing in this contract to the effect that Lamborn & Company could not have transshipped this sugar at Port Said or off the coast of New Jersey or at New York (or Norfolk), nothing in the contract making it unlawful for the carrying steamer to put into New York. If the steamer had put into New York and then gone on to Philadelphia, Lamborn & Company would have performed their contract, which was in its entirety to ship this sugar at Java within a certain period of the calendar and then transport it to Philadelphia by steamer or steamers. So our complaint of the judgment of the Court below is this: that in order to apply *Filley* v. *Pope* to our case, the Court was compelled to assume a condition precedent in order to apply it.

A case which is an example of the effort to import into the contract, a clause as to the return voyage which was not in the contract, is *El Dorado Oil Works Co.* v. *Société Commerciale de L'Oceanie*, 182 Fed. 195. In that case the goods bought and sold was a cargo of Tahiti copra. The contract appears to have read as follows: "The Société Commerciale de L'Oceanie agree to deliver in sacks or in bulk, their option, and the El Dorado Oil Works Co. agree to receive a full cargo of Tahiti copra of fair average quality, tale quale on quay in San Francisco, per 'Brig Lurline,' now en route from Puget Sound to Taiohae and/or Papeete what the vessel loads, estimated to be about 350 tons." There are other parts of the contract which we do not quote. See the fine print, page 196. Now it appears that the brig sailed to Taiohae and thence to Papeete where she arrived on December 1st, 1907. At that port she loaded part of her cargo of copra and on December 17th she sailed for a voyage back to Taiohae where she completed the loading of her cargo of copra on January 20th, 1908. On the arrival of the vessel and her

cargo at San Francisco, the purchaser refused to take the goods and the ground of the refusal was that the voyage stipulated for in the contract was from Papeete to San Francsico "and did not permit her to return to Taoihae after having once touched there on the way to Papeete, and that her return voyage should have been from the last named port to San Francisco and that she should so return without deviation was a warranty necessarily and legally implied in the terms of the contract."

The Circuit Court of Appeals, Ninth Circuit, declined to adopt this reasoning, saying:

> "But the contract, as we read it, does not describe the return voyage, nor does it specifically name a port or ports of loading. It simply provides that the defendant in error shall deliver a cargo of Tahiti copra of fair average quality on the quay in San Francisco per brig Lurline, described to be 'now en route from Puget Sound to Taiohae and/or Papeete.' It is silent as to where the cargo was to be obtained, or as to what the return route should be."

And so we say that our contract is equally silent as to the port or ports in Java where this sugar was to be shipped or loaded on board steamer or steamers and as to the voyage or route which said steamer or steamers were to take in delivering the sugar on the pier at Philadelphia. We assert that our only obligation was to load this sugar at Java, to make shipment at Java within the time as specified by the contract and thereafter without undue delay and by a natural course make delivery f. o. b. railroad cars at Philadelphia, after unloading the sugar from the steamer or steamers which had brought it to that port. And that any other construction of the contract implies and absolutely demands that new and additional clauses be introduced therein by the Court.

We submit that this construction of our contract is sustained by the decision of this Court in *Harrison* v. *Fortlage*, 161 U. S. 57—a case which must have had great consideration not only from the eminence of counsel (Mr. John G. Johnson of Philadelphia and Messrs. William Allen Butler and Wilhelmus Mynderse) who argued for the respective parties, but because the case was argued on November 13th, 1894, and it was not decided until March 2nd, 1896. Mr. Justice GRAY also wrote this opinion. He said:

> "The single question is whether the contract between the parties required all the sugar to be brought to Philadelphia in the Empress of India, upon which it was originally shipped. This depends upon the meaning of the terms of the writing in which the parties must be assumed to have embodied and expressed their whole intention, and to have defined all the conditions of the contract. The Court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

There was a contract which contained these words: "shipping or to be shipped during this month from the Philippines to Philadelphia per steamer *Empress of India*, etc."

Our phrase is "from Java by steamer or steamers to Philadelphia." The Supreme Court of the United States held: "a contract 'to ship by' a certain vessel for a particular voyage ordinarily means simply 'to put on board' *not including the subsequent carriage* and there is nothing in this contract to show that a different meaning was in the contemplation of the parties."

And again this Court said:

> "The sugar in question having been put on board the Empress of India and the conditions of the contract thus satisfied so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the general rules of the maritime law."

In the *Harrison* case the whole quantity of sugar was not even brought to Philadelphia from the Philippines, by the *Empress of India*, for that vessel discharged 700 tons of the sugar in the Island of Bermuda whence it was carried to Philadelphia by another steamer. Obviously under a new bill of lading from Bermuda to Philadelphia.

We claim that this decision of the Supreme Court is on all fours with our case and with our contract, and that this case is the controlling authority and not the decision in *Filley* v. *Pope*.

In *H. O. Wilbur & Sons, Inc.* v. *Lamborn*, 276 Pa. 479, Mr. Justice SCHAFFER (reading for the Court) said at page 486:

> "It cannot be doubted that had the sugar on the *Chifuku Maru* been transhipped to another vessel, and been by it delivered, plaintiff would have been bound to accept delivery. This was ruled in Harrison *v.* Fortlage, 161 U. S. 57. That case has an important bearing on the one under consideration, because what took place with reference to the sugar in question, while not actually, was in result, the equivalent of a transhipment. It holds that a contract for the sale of goods, to be shipped during a particular month from the Philippines to Philadelphia, by a named steamer, at a certain price ex ship, 'no arrival, no sale,' with a further provision, that if, by any unforeseen accident, the named vessel is unable to load, and no other steamer can be procured within the month, the contract is to be

void, does not require the goods to be carried to their destination by the vessel named, but is satisfied if the goods are put on board of her at the Philippines, at the time specified, and upon her being so injured on the voyage by the perils of the sea as to be unable to carry them, they may be transhipped and forwarded by another steamer to the port of delivery. It could not be seriously contended that had the *Chifuku Maru* and *West Cheswald* been proceeding together at the time of the injury to the former's machinery, that the *Chifuku Maru* would have had to tranship sufficient of her cargo to the *West Cheswald* in order that defendants might meet the requirements of their contract, when the latter vessel had on board precisely similar merchandise which could be delivered to plaintiff. In the realm of the practical, what difference could it make to plaintiff so far as delivery is concerned, that the same sugar, shipped in time, was tendered to it on another steamer?"

The technicality sought to be introduced into this case by counsel for the respondent bank has much less to rest on than the objection raised in the case known as *In re: An Arbitration Between Lewis & Peat, Ltd., and Catz American Co., Inc.*, Kings Bench Division, Divisional Court, Decided May 11, 1927; reported 28 Lloyds List Law Reports, page 51, before Lord Chief Justice HEWART, Mr. Justice SHEARMAN and Mr. Justice MACKINNON. See also 26 Lloyds List Law Reports, 263.

By the contract Lewis & Peat, Ltd., agreed to sell and deliver to Catz American Co., Inc., thirty tons of Lampong Pepper to be shipped "by steamer or steamers from Batavia and/or Lampong District Ports to New York" at a certain price per ton c. i. f. New York. The goods were shipped at Batavia on September 28th, 1925, on the *Fuji Maru* under a bill of lading dated that date in which the destination was stated as being Baltimore. Subsequent

to the date of shipment a clerk, presumably of the shipping company, indorsed on the bill of lading that the goods were to be delivered in New York. The bill of lading so altered and modified was tendered in New York in March, 1926, and was rejected by the buyer. The report continues:

> "Mr. Willink now said that the case raised the short point whether the bill of lading was good tender. The contract was for the sale of thirty (30) tons of Lampong Pepper. Documents were tendered in New York, including a Baltimore bill of lading, which was subsequently altered to say that delivery was to be made at New York and not at Baltimore as originally stated. Tender was refused on the ground that the bill of lading was not a good tender. The only objection taken to the bill was that it had been so altered.
>
> "Mr. Russell Davies submitted that the bill was bad under the terms of the contract. The obligation in the operative part of the bill as altered was still to deliver at the port of Baltimore. The indorsement by a clerk on the bill that the goods were to be delivered in New York did not so change the bill as to make it a New York bill and not a Baltimore bill of lading. All that the bill amounted to was a guarantee by the ship, assuming that the clerk's indorsement was authorized, that the goods would be discharged at New York.
>
> "The Lord Chief Justice, in giving judgment, said: This is a special case stated for the opinion of the Court under Sec. 19 of the Arbitration Act, 1889. The question for the opinion of the Court is whether or not a bill of lading dated September 28th, 1925, was a proper tender. In our opinion that question is to be answered: 'Yes, it was.'"

The case of *Bennett* v. *Lewis*, 212 App. Div. 641 (Supreme Court of the State of New York, First Department) illustrates how the courts refuse to defeat contracts because of such refinements.

There plaintiff agreed to sell and the defendant to buy one carload of bleaching powder shipment "from the works." The plaintiff's works were at Solvay, New York. Shipping instructions were to be given by the defendant. On October 13th, 1920, defendant instructed plaintiff to make shipment "Via D. & H. Ticonderoga Village R. R. To order of John D. Lewis, Ticonderoga, New York. Notify The Ticonderoga Pulp & Paper Co., Ticonderoga, New York."

The carload of bleaching powder which the plaintiff tendered under this contract had been shipped from the works to Philadelphia during the contract period October, 1920, where they were transferred to another car and consigned for delivery as called for by the defendant under the contract; so that the shipment proven was not a shipment from the works to Ticonderoga, but a shipment from the works to Philadelphia and thence to Ticonderoga.

There was judgment for the plaintiff which was affirmed by the Appellate Division, First Department, MARTIN, J., saying:

> "The contract did not call for direct routing to Ticonderoga. The question of routing seems to be immaterial inasmuch as it did not prevent prompt delivery."

Perhaps the underlying error involved in the opinion of the Circuit Court of Appeals, Fourth Circuit, is in failing to visualize and comprehend the exact nature of the plaintiffs' obligation. This, as we have pointed out, was not confined to a single act to be performed at some port in Java. It was constituted of a series of acts, thus: Shipment of the sugar on board steamer at Java; such shipment to be by loading on board in August and/or September, 1920; the vessel was to be a steamship or one or more steamships; and the sugar was to be carried to

Philadelphia on such steamer or steamers; there it was to be unloaded and the gross and net weight thereof taken upon being landed; the customs duty was to be paid to the American Government; and the sugar in bags, weighing about 224 lbs. each was then to be loaded on cars without expense to the purchaser (free on board) and consigned as was written, thereby for the first time becoming the purchaser's goods.

All of these things had to be done by Lamborn & Company in order to perform this contract. It all was a process of delivery, a continuity of action. But the Court below seemed to have considered it as a single act and its entire nature, conduct and effect to be weighed and governed by an ocean bill of lading belonging to Lamborn & Company, issued at Java to Lamborn & Company's vendors.

But this Court has recently held that shipment from one country *to* another does not consist of an isolated act, at the place of inception, *i. e.*, loading on board carrier or delivery to carrier. We refer to *United States* v. *Freeman*, 239 U. S. 117.

That was an indictment under Section 240 of the United States Criminal Code, making it a punishable offense knowingly to "ship or cause to be shipped from one state, * * * into any other state, * * * or from any foreign country into any state, * * *" any package of or containing intoxicating liquor of any kind, "unless such package be so labelled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." The indictment was returned in the District of Kansas and charged the defendant with violating the statute by a shipment of liquor from Joplin, Missouri, into Cherokee County, Kansas. By a motion to quash and a demurrer it was objected that the offense denounced by the statute became complete when the package was delivered for shipment to the car-

rier, and therefore that the offense charged was not cognizable in the District of Kansas but only in the Western District of Missouri. The District Court granted the motion, and the Government appealed to this Court.

This Court reversed the judgment, saying at page 120:

> "As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word 'ship' must be read as if it were 'deliver for shipment.' No doubt it sometimes has that meaning, but it plainly is not so used in this instance."

This case, we submit, is very much in point. In the first place, the phrase "ship from one state into any other state" or "ship from any foreign country into any state" is very similar to our expression "Shipment from Java by steamer or steamers to Philadelphia." The word "to" used in this sentence does not greatly differ from the meaning of the word "into."

Yet in the cited case this Court repudiated the theory of the Court below that the act of "shipment into" was completed when the goods were delivered to the carrier, and considered the expression as referring to a continuing act, *i. e.*, the loading on board a common carrier and its transportation into one of the states.

We beg leave to add a few paragraphs on the other fallacy in the opinions of the Court below in applying the rules of law applicable to the construction of contracts, cost, insurance and freight, known among merchants as c. i. f. contracts.

Everyone knows that in those contracts there is always a stipulated voyage. That must be because the buyer becomes the owner of the goods on lading. He must take out effective insurance or it must be taken out for him *on the goods as owner*, on a named ship, for a certain voyage from port to port, and it is a commonplace that if the terms and conditions of such a policy of insurance are violated, the contract is at an end, and cannot be enforced by the assured.

The English Courts have pointed out that the rules of law applicable to c. i. f. contracts are peculiar to those contracts and cannot be applied elsewhere; and the cases cited by the Court below from the English Courts were all c. i. f. contract cases with one exception, and that exception was where the violation by the sellers of the contract was like that in *Filley* v. *Pope*, a violation of the time or place of shipment.

Thus *Landauer & Co.* v. *Craven & Speeding Bros.*, Law Reports, K. B. Div., Vol. 2, 1912, page 94, was a c. i. f. contract and is discussed as such by the King's Bench.

Hansson v. *Hamel & Horley, Ltd.*, 2 App. Cases (1922), page 36, was also a c. i. f. contract and the discussion in the House of Lords was as to the necessary requirements of performance by the seller of his obligations under a cost, insurance and freight, contract, as is well shown in the following remark by Lord Sumner who said:

> "The arguments of counsel on both sides in the case of *Landauer & Co.* v. *Craven & Speeding Bros.* show that Cox, McEwan's case was understood not to turn on any question of the shipping documents which are required by c., f. and i. terms in general, and I do not think that this case can affect the present appeal,"

meaning, we submit that authorities on cases not cost, freight and insurance contracts were not applicable to

said contracts and conversely that authorities on cost, insurance and freight contracts were not applicable to contracts of a different nature.

Furthermore, as to the case of *Ashmore & Co.* v. *C. S. Cox & Co.* (Law Reports, Q. B. Div., Vol. 1, 1899, page 436), we would point out to this Court that that was a case not on a c. i. f. contract but where the seller had failed to make shipment, that is, to load on board a sailer or sailers *within the specified time.*

But it is interesting and illuminating that Lord Chief Justice RUSSELL in that case intimated that the sellers, if they could find a ship in the Port of London which had made the designated shipment, might substitute and deliver off the ship so found. The Lord Chief Justice said:

> "On November 4th the defendants for the first time wrote saying that they were not in a position to make any other declaration than the declaration of the ship Dulwich. Up to that time it would have been open to the defendants, as I conceive, had the circumstances of the trade permitted of it, to have got hold of any other shipment, if there were any such, of Manila hemp by sailer or sailers, shipped between May 1st and July 1st, and applied such shipment to the contract in question."

Precisely, we beg leave to point out the ruling of the Supreme Court of the State of Massachusetts in *Mann* v. *The Eastern Sugar & Products Co.*, 244 Mass. 100.

But if under a contract *not* c. i. f. the sellers having no ship of their own or no cargo of their own could go about the Port of London and find some other ship or some other cargo which had made the shipment at the time and from the place required by their contract and therewith make good delivery, what becomes, may we ask, of the supposed implied warranty that the seller must load the cargo by a bill of lading to the designated port and

see to it that the ship sails direct from the port of shipment to the port of destination? No such rule as this has ever been laid down in an American Court other than in the case at bar, and the existence of such a rule is clearly negatived by the remarks of Lord Chief Justice RUSSELL above quoted, as well as by the decision of the Supreme Court of Massachusetts in the *Mann* case, *supra.*

Except for the decision of the Fourth Circuit in the case at bar, every reported case in the United States and in England, where the subject-matter of the controversy was a contract f.o.b. named American or English port, has uniformly upheld the right of the importer to make delivery from any ship which reached the port or was in the port, provided she carried the stipulated goods and that they were shipped in the agreed foreign country, that is, laden on board, within the agreed period of time; quite regardless of whether it was one ship or another that carried them, and quite regardless of the voyage the ship had made.

We believe there never has been a departure from this rule, until the decision was rendered which is now sought to be reversed. We can find no decision to the contrary in either American or English jurisdiction.

The cases cited by Mr. Benjamin in his work on Sales (5th Edition, pp. 588-9) supposed by many to be decisions denying the right of substitution of vessels, are not such decisions. We refer to:

Reuter v. *Sala,* Law Reports 1879, 4 Com. Pleas Div., 239;
Busk v. *Spence,* 4 Camp., 329 (1815);
Graves v. *Legg,* 1854, 9 Exch., 709.

Not one of them is a case against the use of one vessel rather than another. *All were cases where there was a plain violation of express language of the contract, either*

in respect to shipment, i. e., lading, or in respect to the declaration of vessels within the agreed period of time.

On the other hand, the decisions holding that the importer performing an f.o.b. contract calling for delivery at a certain American or English port, might make delivery off of any vessel which carried the goods, shipped on her in the time stated, form an unbroken line of authority from early times down to the present day and include about forty of the *Lamborn* cases.

Thornton v. *Simpson*, 6 Taunt., 556;

Ashmore & Co. v. *C. S. Cox & Co.*, Law Reports 1899, 1 Q. B. D., 436;

Harrison v. *Fortlage*, 161 U. S., 57;

Carver v. *Sassoon*, 17 Com. Cases, 57;

El Reno Wholesale Grocery Co. v. *Lamborn* and 28 other cases decided simultaneously therewith, Special Term, New York County, New York Law Journal, December 15th, 1920;

Telling-Belle Vernon Co. v. *Lamborn, et al.*, New York Supreme Court, New York County, New York Law Journal, December 22nd, 1920;

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed 195 App. Div., 909;

Pennsylvania Milk Products Co. v. *Lamborn* and six other cases decided simultaneously therewith, New York Supreme Court, New York County, New York Law Journal, January 4, 1921;

J. Hungerford Smith Co. v. *Lamborn*, 200 N. Y., Supp., 292;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, District Court, Southern District of New York, 276 Fed., 325;

Lamborn v. *Log Cabin Products Co.*, 291 Fed., 435;

Lamborn v. *National Exchange Bank of Anderson, Indiana, United States District Court, District of Indiana*, ANDERSON, U. S. D. J.;

H. O. Wilbur Sons & Co. v. *Lamborn*, 276 Pa. State, 479;

Williams Ice Cream Co. v. *Lamborn and Chase National Bank*, 120 Misc., 301; 210 App. Div. 179;

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100;

Gambrill Mfg. Co. v. *American Foreign Banking Corporation and E. R. Sherburne Co.*, 194 App. Div., 425;

Pennsylvania Sugar Refining Co. v. *Czarnikow Rionda Company*, Circuit Court of Appeals, Third Circuit, 245 Fed., 913;

Iasigi v. *Rosenstein*, 141 N. Y., 414;

Cunningham v. *Judson*, 100 N. Y., 179;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, Circuit Court of Appeals, Second Circuit, 10 Fed. (2d), 697.

(Certiorari denied: 271 U. S. 683-685, 686.)

This rule thus firmly and widely established in American and English law, that an importer operating under a contract f.o.b. Port of Philadelphia or Port of London or Port of New York, may make delivery at said port from any available vessel, carrying the goods which were shipped in time, is not in conflict at all with the well known decisions of this Court and of England that the shipment of the goods must be in time, *i. e.*, the goods must be laden on board at the foreign port or wherever else the shipment was to be made, within the time speci-

fied by the contract and wholly within that time. We refer to such cases as

Bowes v. *Shand*, L. R. 2, App. Cases 455;
Filley v. *Pope*, 115 U. S., 213;
Norrington v. *Wright*, 115 U. S., 188.

In all of those cases facts were present showing that the seller had failed to make the agreed shipment. This, we submit, is an utterly different branch of the law. In *Bowes* v. *Shand*, the rice had been not wholly shipped within the designated months. In *Norrington* v. *Wright*, the rails had not been shipped in the designated quantities within the designated months; and in *Filley* v. *Pope*, the Scotch iron had not been shipped from the named port but from another than that stipulated in the contract. If the plaintiffs had shipped the sugar from India instead of from Java that case would have applied. But it had no relation to the subject-matter.

The opinion of the Fourth Circuit (by Circuit Judge Rose, 2 Fed. [2d], 23), affirmed and followed into final judgment by the decision of the Fourth Circuit in 15 Fed. 2nd 473, while refusing to follow the numerous English decisions on f.o.b. contracts and shipments, and the very many state and federal decisions directly on the Lamborn shipment clause under the Lamborn f.o.b. contracts, failed to cite a single authority either in American or English law, that Lamborn & Company had not the right to make delivery at Philadelphia of this sugar from the *West Cheswald* because her bill of lading contained the words "Port Said, option New York" covering destination, instead of the words "Philadelphia, Pa."

The words "Port Said, option New York" are testified to in the record before this Court as meaning this: That within a certain time of the arrival of the vessel at Port Said, Lamborn &. Company had under its bill of lading

the option to send this vessel to any other port, and that failing the exercise of the option she would then proceed as a matter of course to New York (Rec., pp. 47-48). So that when this ship was loaded at Java and proceeded towards Port Said, Lamborn & Company had the right, if they chose, to direct her to go to Philadelphia instead of New York. She was destined for no particular port but could go to any one. She was carrying Lamborn & Company's sugars, out of which they could make delivery at any port where they had agreed to deliver sugars so laden.

The objection to this is, we submit, so tenuous, indeed absurd, that it is difficult to discuss it. Mr. Justice WAGNER dismissed it as sophistry. (See *Williams Ice Cream Co.* v. *Lamborn*, 120 Misc. [N. Y.] 301.) District Judge GRONER said in substance that the objection involved injustice and unfairness (Rec., p. 51). The Second Circuit said bluntly that the ship performed the contract. (*Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, 10 Fed. [2nd], 697). The Supreme Court of Pennsylvania said, in effect, that Lamborn had made no contract for a direct voyage, but that even if the Lamborn contract had called for a direct voyage from Java to Philadelphia, that court would not necessarily have held that the *West Cheswald* had failed to make such a direct voyage (*H. O. Wilbur Sons & Co.* v. *Lamborn, supra*).

But the Lamborn contract with T. S. Southgate & Co. and the shipment clause of the letter of credit issued by the defendant National Bank of Commerce *did not anywhere specify or stipulate for a direct voyage from Java to an American port.*

One reads the opinion of the Circuit Court, Fourth Circuit, again and again, in a vain attempt to find therein the substance of the objection.

The learned Circuit Judge who wrote that opinion did

attempt to formulate some basic ground, some sort of reason why he deemed it necessary to hold that we could not deliver from the *West Cheswald*. It is, we submit, if found anywhere, to be found in the following words:

> "Now it is true, as it is pointed out by the learned counsel for the seller that the contract here is not a c.i.f. contract, *but it is one under which the buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle*" (Rec., p. 85). (Italics ours.)

But this stated reason is fallacious and were it not, it is entirely inadequate to change an f. o. b. contract Philadelphia into a c. i. f. contract Java port.

We submit that the purchaser of this sugar f.o.b. Philadelphia had no insurable interest *in the sugar* as long as it was Lamborn & Company's. It was our sugar until delivered aboard railroad cars at Philadelphia. The purchaser had no insurable interest in our goods.

But the purchaser, like any other purchaser, could have insured his *profits* (circumstances permitting it at the time of his application for such insurance) and on the retrial of this case petitioners by amendment and by competent expert evidence and documents under the amended notice of motion for judgment sought to prove that any right of the purchaser T. S. Southgate & Co. to insure its profits under its contract with Lamborn & Company was not in the least impaired by the nature of the bill of lading of the S. S. *West Cheswald* which carried the sugar or by her diversion off the coast of New Jersey to the port of Philadelphia there to make delivery. (See amended notice of motion for judgment, p. 95; see deposition of Richard Jones and exhibits attached, Rec., p. 176 *et seq.*)

So that if alleged interference with the purchaser's right to insure his profits was the reason, the basic ground for the decision of the Fourth Circuit, it was an error of fact.

It was controverted by the practice of insurance of profits, by the rules of the great insurance bodies of the Atlantic coast and of England, and it was controverted by the very forms and contents of binders and policies which are in use in the business of insurance of profits and which provide on their face for substitution of steamers and for diversion of the carrying vessel and her entering into other ports or making a different voyage. (See deposition of Jones and exhibits.)

We submit the Court will find in this record clear evidence on the subject of insurance of profits, clear evidence that the purchaser, T. S. Southgate & Company's right to insure profits (if they could have done so under the circumstances) was not prejudiced or impaired and could not have been prejudiced or impaired in the slightest degree by the nature of the bill of lading of the S. S. *West Cheswald*, by her stated designation Port Said, option New York, or by her diversion on the high seas to the port of Philadelphia.

We submit this error should no longer persist, and that this Court should correct it.

Nor is there a decision in the books (and counsel writing this brief have examined every reported case on the right and practice of insuring profits under a contract of purchase and sale which can be found in the English and American law books) which holds or has ever held that the purchaser under an f. o. b. contract, Philadelphia, such as the Lamborn contract in this case, had any right of insurance of the goods on board the vessel; nor is there a case in the books which holds (except the Circuit Court decision of the Fourth Circuit now under review) that the purchaser's right to insure his profits under a purchase and sale contract covering goods to be imported by the seller and delivered f. o. b. American port to the purchaser, was impaired or prejudiced in the slightest

degree by transshipment of the goods, by the port or ports of destination of the vessel or vessels, or by the ship's diversion from one port to another.

Counsel believe that no such case or cases exist.

The decision of the Fourth Circuit, ignoring *Harrison* v. *Fortlage, supra,* overruling District Judge HAND in *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, supra,* and Mr. Justice SAWYER in *J. Hungerford Smith Co.* v. *Lamborn, supra,* and Mr. Justice WAGNER in *Williams Ice Cream Co.* v. *Lamborn, supra,* the Supreme Court of Pennsylvania in *H. O. Wilbur Sons & Co., Inc.* v. *Lamborn, supra,* and all the other cases which we have above mentioned defining the seller's obligation under f. o. b. contracts, is undoubtedly based on two things: (1) the principle decided in *Bowes* v. *Shand, Norrington* v. *Wright* and *Filley* v. *Pope,* that the shipment must be made in time at the specified place and in the specified quantity; and (2) on the assertion that the purchaser's right to insure the sugar, brought the case within the rule of c. i. f. contracts and was violated by the shipment made on the *West Cheswald.* (Although on the second appeal the Fourth Circuit, by ROSE, C. J., declared that evidence of the underwriting practice of insurance of profits was immaterial and had been rightly excluded on the second trial.)

There can be no doubt that the decision of the Fourth Circuit was written about the case of *Filley* v. *Pope.* It is a misapplication of that case.

There can be no doubt that the dictum in that case concerning insurance contained in the opinion of Mr. Justice GRAY, namely:

> "* * * the buyer would have an insurable interest in the iron during the voyage by reason of the title which would accrue to him under the con-

> tract on arrival and delivery and of the profits that he might make in case of a rise in the market. 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Co.*, 16 Pickering 397; *Eastern Railroad* v. *Relief Insurance Co.*, 98 Mass. 420, 423."

was the cornerstone of said Fourth Circuit's decision. It follows that we must examine the source and origin of that dictum.

Chancellor KENT in 3 *Kent's Com.* 276, summarized the decision of the House of Lords in the case of *Lucena* v. *Craufurd*, 5 Bosanquet & Pullers 269, to the general effect that "commissions to become due to public agents and all reasonable expectation of profits, were insurable interests."

The Chancellor's distinguished Editor (6th Ed.), cited *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass. 420, 423. In this case the opinion of the Massachusetts Supreme Court was written by Justice GRAY. It was not an action on an insurance policy insuring profits. It was an action on a *fire* insurance policy insuring the railroad company against "their liability for loss and damage by fire occasioned by sparks from railroad engines to property of others situated on lands not owned or occupied by the insured."

In the course of his opinion in the case, Justice GRAY said:

> "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. 3 *Kent's Com.* (6th ed.) 276; *Insurance Co.* v. *Chase*, 5 Wallace, 509, 513; *Wilson* v. *Jones*, Law Rep. 2 Exch. 150, 151."

Insurance Co. v. *Chase*, 5 Wallace, 509, need not be

discussed, as it was not a case of insurance of profits; *Wilson* v. *Jones*, Law Reports, 2 Exch., 139, was an action on an insurance policy taken out by a shareholder in the Atlantic Telegraph Company, involving the laying of the first submarine cable. *Lucena* v. *Craufurd*, was a case of the insurance of the commission for the sale of Dutch property under an English statute, 35 George III, Chapter 80, Section 21, Dutch ships actually seized under orders of the British Government. It had nothing to do with the insurance of profits. *French* v. *Hope Insurance Co.*, 16 Pickering, 397, was an action to recover on a policy of insurance. It is enough to say that the assured had bought and paid for a one-half interest in the cargo.

The foregoing being the real nature of the cases referred to by Mr. Justice GRAY when he read the decision in 1868 for the Supreme Court of Massachusetts in the case of *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, we find the same citations in the opinion of the Court in *Filley* v. *Pope*, namely: 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Company*, 16 Pickering, 397, and *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass. 420.

And when the very learned and distinguished Justice came to write for the Court in *Harrison* v. *Fortlage*, he again cited, as authority for the alleged insurable interest, the same cases, namely: *Insurance Co.* v. *Chase*, 5 Wallace, 509-513; *Filley* v. *Pope*, 115 U. S. 213-220; *Wilson* v. *Jones*, L. R., 2 Exch. 139, 3 *Kent's Commentaries*, 276.

We very respectfully submit that the cases cited by Mr. Justice GRAY were not based on the practice and business of insurance of profits, did not involve any such contract and were not in a single instance a case where profits had been insured by a purchaser, and that, therefore, neither the dictum in *Filley* v. *Pope* nor the cases mentioned in connection therewith may properly be used

to sustain a judicial finding that the purchaser here or the Bank had an insurable interest in our sugar, which the bill of lading of the *West Cheswald* destroyed.

Now when we come to the plain fact that the purchaser's right to insure profits under this Lamborn contract and on any other contract like it, is not vitally concerned with the terms of the original loading or with the name of the ship or with its voyage or course, but that it stands unimpaired, whether it be one ship or another, whether there be a deviation or not, whether the name of the vessel be changed, it is apparent that the reason sought to be found in the subject-matter of insurance of profits by a purchaser for holding that there was an implied obligation in our contract, that the loading should be *originally for Philadelphia and that the ship should proceed direct to that port,* disappears.

POINT TWO.

Both State and Federal Courts, including the Second Circuit Court of Appeals, have construed Lamborn & Company's obligations under this shipment clause in accordance with the construction urged by us in Point One; and all these Courts have held that delivery of the commodity by Lamborn & Company from the steamship "West Cheswald" was a good delivery under that clause.

When Lamborn & Company in 1920 sold in this country the Java sugars purchased by them abroad, they prepared and used a uniform printed form of contract. This contract contained the following provisions as to shipment and delivery to their American customers:

> "F.O.B. cars Philadelphia, Pa., landed weights * * * Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The contract between Lamborn & Company and T. S. Southgate & Company in the case at bar was upon this printed form and contained the said provision. The contracts with Matthew Smith Tea, Coffee & Grocery Company, with the Pennsylvania Milk Products Company and with L. Brenner Sons & Perloff, involved in the three cases in the Second Circuit, reported in 276 Fed. 325 and 10 Fed. (2d), 697, were likewise upon this printed form and contained the said provision.

The letter of credit issued by the National Bank of Commerce of Norfolk, Virginia, in the case at bar, which was supplied by T. S. Southgate & Company pursuant to said contract, likewise contained the said provision.

The sugar delivered to Matthew Smith Tea, Coffee & Grocery Company, to the Pennsylvania Milk Products Company and to L. Brenner Sons & Perloff, as well as to T. S. Southgate & Company, f.o.b. Philadelphia, all came from the same ship, *West Cheswald,* and had been carried by the *West Cheswald* from Java to Philadelphia under the same ocean bill of lading containing the clause:

"Port Said, option New York."

In the three cases in the Second Circuit, the respective banks which had issued the letters of credit duly honored them and paid Lamborn & Company's drafts; thereafter Lamborn & Company's customers, in order to assert their claim that Lamborn & Company had breached their contracts and had failed to deliver the sugar called for therein, brought suits against Lamborn & Company as for money had and received.

But in the case at bar, the National Bank of Commerce of Norfolk refused to honor its letter of credit and instructed the Bankers Trust Company of New York not to make payment under it. So that Lamborn & Company, as plaintiffs, brought the suit at bar against the National Bank of Commerce of Norfolk, Virginia.

The sole ground for denying Lamborn & Company a recovery herein was that, as the Fourth Circuit held, Lamborn & Company had failed to comply with the shipment provision of said letter of credit above quoted in that the sugar covered by the documents presented to the defendant Bank had not been shipped "from Java to Philadelphia" but had been shipped on the *West Cheswald* under an ocean bill of lading reading "Port Said, option New York."

The Court will observe on examining the record of the case that the Bankers Trust Company, after examination, declared that Lamborn & Company's documents, among which was the said bill of lading, were "in order" and so advised the National Bank of Commerce of Norfolk, and strongly urged the defendant Bank to honor its letter of credit and to permit the Trust Company in New York to make due payment thereunder (Plaintiffs' Exhibits 227 and 229, Rec., pp. 146 and 148).

When the three cases above referred to came on to be heard in the Circuit Court of Appeals, Second Circuit, that Court had before it the first decision (2 Fed. [2d], 23) of the Fourth Circuit in the case at bar, and it was urged upon that Court that Lamborn & Company had failed to comply with the shipment provision of the contract for the reasons stated by Circuit Judge ROSE in that opinion.

But the Second Circuit refused to hold that Lamborn & Company had breached its contract. On the contrary the Second Circuit held that Lamborn & Company had performed it; that the shipment on board the *West Cheswald* was a shipment from Java to Philadelphia, hence that Lamborn & Company was entitled to retain the purchase money of the sugar. Circuit Judge HOUGH said:

> "Reduced to its lowest terms, Smith Company was entitled to a certain quantity of Java sugar f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled."

Following the decision of the United States Circuit Court of Appeals, Second Circuit, in the three cases *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, Pennsylvania Milk Products Co.* v. *Lamborn* and *L. Brenner Sons & Perloff* v. *Lamborn*, the plaintiffs in those cases petitioned this Court to issue writs of certiorari to review the judgment of the Second Circuit. This Court denied the petitions (271 U. S. 683, 685 and 686).

The decision of the United States Circuit Court of Appeals, Second Circuit, to which we have referred was one affirming the decision in the United States District Court for the Southern District of New York, made by U. S. District Judge LEARNED HAND, now of the Circuit Court, and reported in 276 Fed. 325.

In the Supreme Court of the State of New York, our delivery off the *West Cheswald* under this form of contract and shipment clause has been held good. Thus, in the case of *Williams Ice Cream Co., Inc.*, v. *Chase National Bank and Lamborn & Company*, 120 Misc. 301, modified and complaint dismissed with costs, 210 App. Div. 179, the contract was likewise upon the same printed form as in the case at bar and contained the same shipment clause.

The identical objection against the legality of delivery from the *West Cheswald*, which was held fatal by the Circuit Court of Appeals, Fourth Circuit, was presented to the New York Supreme Court. But the Special Term (Mr. Justice WAGNER presiding) held the point of no weight. He said, at page 305:

> "Plaintiff urges that the sugar was not a shipment from Java to Philadelphia, but to New York; * * * In other words, that a shipment is not the course that a designated vessel takes, but a course intended that it should take. This refinement to me seems more one of sophistry than reason and carries with it failure of conviction."

Mr. Justice WAGNER dismissed the complaint, but without costs (120 Misc. 301). Upon appeal to the Appellate Division, however, the judgment was modified so as to dismiss the complaint with costs, and as thus modified, affirmed (210 App. Div. 179).

Again, Mr. Justice SAWYER of the New York Supreme Court, at Special Term at Rochester (Monroe County), decided that Lamborn & Company had the right to make delivery of these sugars from the *West Cheswald*: See *J. Hungerford Smith* v. *Lamborn*, 200 N. Y. Supp. 292.

Again, in a case which came before him at Special Term of the Supreme Court, New York County,

> *Telling Belle Vernon Co.* v. *Lamborn*, New York Law Journal, December 22nd, 1920,

Mr. Justice COHALAN, in denying an injunction to restrain Lamborn & Company from collecting against a letter of credit, held in substance and effect that a delivery of sugar from the S. S. *West Cheswald* was lawful and in compliance with the contract.

A similar decision was handed down by Mr. Justice BENEDICT sitting at Special Term, Kings County, in the case of

> *Central Sugar Co.* v. *Lamborn*, 200 N. Y. Supp. 499; affirmed without opinion 195 App. Div. 909.

Again, in eight cases which came before him at Special Term, New York County, Mr. Justice BURR (afterward of the Appellate Division, First Department) in denying injunctions against Lamborn & Company, held that deliveries of sugar from the said S. S. *West Cheswald* complied with the contracts:

> *Pennsylvania Milk Products Co.* v. *Lamborn;*
> *L. Brenner Sons & Perloff* v. *Lamborn;*

Mollen-Thompson & James Co. v. *Lamborn;*
Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn;*
T. H. McLain Grocery Co. v. *Lamborn;*
W. E. Sheppard & Co. v. *Lamborn;*
T. S. Southgate & Co. v. *Lamborn* (Action No. 2);
Williams Ice Cream Co. v. *Lamborn.*

(All reported in New York Law Journal, issue of January 4th, 1921.)

Again, in Pennsylvania, the State of delivery, the same contention was made in the case of

H. O. Wilbur Sons & Co. v. *Lamborn,* 276 Pa. State 479.

The contract was upon the same printed form and contained the same shipment clause which we have described. There it was argued with great learning and ability through all the courts of Pennsylvania that Lamborn & Company could not lawfully make delivery of said sugar at the port of Philadelphia from the said S. S. *West Cheswald* owing to the nature and contents of her bill of lading. But once more the point was held not to have been well taken, the Supreme Court of Pennsylvania saying:

> "Some point is made * * * of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia.'"

The same view thus expressed by the courts of New York, and Pennsylvania was taken by United States District Judge D. LAWRENCE GRONER upon the first trial of the case at bar. He said:

> "* * * the letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me that it would be a compliance with the contract. It would be all that reason and fair play and justice would require" (Rec., p. 51).

It remains for us to say that the decisions of those Courts on this precise question were not by any means inadvertent. In every one of those cases, able counsel presented with the utmost ingenuity and learning all the arguments and cited all the cases which were proffered by our distinguished opponent in the case at bar and adopted by the Circuit Court of Appeals, Fourth Circuit. All those other Courts rejected the contention.

The issue is clear cut. For if the opinion and decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar is sound law, then the Supreme Court of the State of New York, the Supreme Court of the State of Pennsylvania, the District Court of the United States for the Southern District of New York, the District Court for the Eastern District of Virginia and the United States Circuit Court of Appeals for the Second Circuit have all decided erroneously and a body of law regarding shipment arising under the Lamborn contracts throughout the United

States, which has grown up during the last seven years is erroneous and must be wiped out from the reports.

We submit, that a decision of a single court must be sound and unimpeachable indeed that compels this Court to overrule so many other learned courts and judges.

That the judgments below are opposed to all other judicial authorities on this question must, we think, be conceded; and that the judgments impede commerce, both foreign and domestic, while the other authorities facilitate it, must we think also be conceded.

Most shippers and importers do not control the vehicle of transportation. Rarely, if ever, does the item of goods bought and sold comprise a whole cargo or even fill a single freight car; and hardly any ship except the crack passenger liner finds it possible to make an uninterrupted voyage.

We have not argued in this brief other errors in the judgments under review such as:

a. The rejection of our proposed amendment to the plaintiffs' notice of motion for judgment on the second trial (Rec., pp. 103-106);

b. The consequent exclusion of our proffered evidence and testimony on trade custom showing the accepted understanding of the meaning of the shipment clause in the letter of credit (Rec., pp. 164-175);

c. The consequent rejection of our testimony and evidence concerning the business and practice of insurance of profits (Rec., pp. 176-200);

d. The overruling of plaintiffs' contention that the defendant Bank was estopped from objecting to the form of Lamborn & Company's bill of lading of the sugar on the *West Cheswald* because the Bank did not raise the objection during the lifetime of the letter of credit but made other and

different objections; whereas had it made the objection on which it has succeeded, we could have shipped against the said letter of credit sugar to the purchaser Southgate & Company shipped from Java on the S. S. *Washington Maru* during the contract months, which was carried to Philadelphia under a bill of lading reading:

"From Surabaya to Philadelphia"

(Rec., pp. 154-157; Plaintiffs' Exhibit 235, p. 120).

We consider those errors to be entirely subordinate to the great error of the Court below in finding any breach of contract on our part in the form or contents of the bill of lading for our goods on the *S. S. West Cheswald* wherein the Court below has set itself in opposition to all the other recorded decisions of American and English courts so far as our diligence has discovered them to exist. For regardless of other errors, if the plaintiffs are right in their claim as to the meaning of their contract, and if the Courts of New York and Pennsylvania and certain United States Federal Courts are right in sustaining that claim and construing this shipment clause as having been fully performed by the plaintiffs, the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar must be reversed, and the existing law on this subject of performance of an f. o. b. shipment contract, which prevails (except in the Fourth Circuit) wherever the English Common Law is the law of the land, must be given the final sanction of this Court.

POINT THREE.

The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, *et al.*, etc.,

Plaintiffs-Petitioners,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA,

Defendant-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, by Order Allowing the Certiorari, filed February 28, 1927.

REPLY BRIEF IN BEHALF OF PLAINTIFFS-PETITIONERS.

POINT ONE.

Respondent's argument is based in reality on the postulate that the shipment clause in this letter of credit called for a DIRECT VOYAGE of the steamer or steamers from Java to Philadelphia. The shipment clause did not so provide.

The simple facts of this case are that Lamborn & Company's vendors shipped the sugar for Southgate & Company and others, on a Japanese steamship, the *Chifuku*

Maru in September, 1920, and received ocean bills of lading covering transportation from Cheribon and Samarang, two ports in Java, to Philadelphia (Plaintiffs' Exhibits 1 to 7, Rec., pp. 113-114). When the *Chifuku Maru* became disabled, approaching Port Said, and it was known to the plaintiffs that she would be detained there, having another steamer the *West Cheswald* which carried the same kind of sugar, shipped in the same month in 1920 from Java, then moving toward New York, plaintiffs sent the *West Cheswald* into Philadelphia to make delivery of sugar under contracts (with Southgate and others) requiring delivery f. o. b. railroad cars that port.

It is perfectly true that in so doing plaintiffs desired to make delivery of the sugar before the expiration of certain letters of credit—for instance this letter of credit expired January 31st, 1921 (the *Chifuku Maru* arrived at Philadelphia on February 4th, 1921; Rec., p. 127)—but in thus protecting their own rights it cannot be said that they were not also serving the best interests of their customers in making a more prompt delivery in a falling market.

Thus in a sense the *West Cheswald* and her cargo was a reserve or reservoir of these goods available in the very emergency which happened. She carried the same goods, laden on board, *i. e.*, shipped at Java, in the month of September, 1920, *and she carried these sugars straight from Java to Philadelphia.* Hence coincident with her being ordered to Philadelphia, there was sent to Southgate & Company the letter dated December 13th, 1920 (Plain-

tiffs' Exhibit 52, p. 122) the final declaration of steamers in this case as follows:

"December 13, 1920.

Messrs. T. S. Southgate & Company,
Norfolk, Virginia.

Dear Sirs:

CONTRACT APRIL 23, 1920, 1000 BAGS, 10% MORE OR LESS

On November 10, 1920, we advised you that the Steamer *Chifuku Maru*, previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of November, 1920, had been unavoidably delayed, owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer *West Cheswald*, carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Very truly yours,

LT LAMBORN & COMPANY"

Now, the shipping clause in the letter of credit read thus and not otherwise (Rec., p. 107):

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

And the question is wherein did this resourceful and prompt delivery of the goods, from a steamer which had come direct from Java to Philadelphia, constitute any breach of the said shipping clause?

In the minds of the plaintiffs, those acts constituted a conscientious performance of their contract. It is of record, indelible and unequivocal, in what respects the Norfolk Bank claimed that those acts did *not* constitute performance—we mean claimed *at the time* when it refused to pay and while the letter of credit was still open. We refer to Plaintiffs' Exhibit 230 dated January 22nd, 1921 (pp. 151-152, Rec.). It is a letter bearing every evidence on its face of preparation with aid of counsel, a letter divided into four numbered paragraphs and accompanied by specifications and details of the charges of a broken contract.

Nothing could be more circumstantial or be more convincing evidence against the Norfolk Bank than this document and the papers attached thereto. Therefore, we turn to it and invite the Court to regard it as conclusive proof of the exact claims of breach made by the Norfolk Bank on its refusal to honor the letter of credit in this case.

The said alleged breaches are contained in Paragraphs numbered "(3)" and "(4)" of that letter. The first alleged breach was that we had made successive declarations of steamers, described in specification "(3)" as

> "five different shifting sets of declarations of shipments of this product."

The other ground, set out in specification "(4)" of said document, was stated to be

> "unmistakable government evidence * * * that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter" (*i. e.*, the shipment clause we are discussing).

We shall have to go back to a telegram from the defendant Norfolk Bank to the Bankers Trust Company

dated December 27th, 1920 (Plaintiffs' Exhibit 36, p. 143) to find out what the bank meant by this statement of "government evidence of shipment" eighteen days late. There we find it:

> "that ship on which loaded *sailed* from Samarang October *eight* calling at Mascassar then Borneo and finally back to Samarang from whence *sailed for New York October seventeenth.*" (Italics ours.)

In short a confusion by the Bank at Norfolk between *shipment, i. e.,* loading on board, and *sailing* or *clearance* from Java or Javan port.

Such was the basis for refusal, upon which the respondent bank stood while this letter of credit was pending, and while the defendant was being urged to honor it by its New York representative, Bankers Trust Company.

This Court will observe that there is nothing in those stated grounds concerning a direct voyage; there is nothing concerning any alleged insurance right of the purchaser; there is nothing challenging the fact that the merchandise placed free on board railroad cars at Philadelphia was Java White Sugar.

Once more let us regard the words of the shipment clause in this letter of credit (Rec., p. 107):

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

Not a word about clearance or sailing from Java; not a word about the nature of the voyage from Java to Philadelphia; nothing to indicate whether the voyage was to be eastward through the Pacific Ocean and Panama Canal, or around Cape Horn, or whether it was to be westward through the Indian Ocean and the Suez Canal, or around the extreme southern tip of Africa and thence across the

Atlantic Ocean; not a word about the time within which the ship must arrive at Philadelphia or within which the sugar was to be delivered to the purchaser by loading free on board railroad cars at that port; not a word about declaration of steamer or steamers in favor of the bank.

Hence, it was true that in respect to the grounds thus specified in detail by the respondent bank each ground was untenable and was an objection in regard to an alleged matter as to which the language and contents of the letter of credit were silent.

It remained to invent new grounds for the purpose of this litigation. Therefore, in the face of the document from which we have quoted, there was introduced on the first trial oral testimony by an officer of the respondent bank, interrogated by its counsel, to this effect (Rec., p. 65):

> "Q. Why did you decline to pay it(this letter of credit)? A. You want me to elaborate?
>
> "Q. Tell your reason in full to the jury. A. *We had information that the ship on which the sugar was tendered had been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia.* We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and *that was our reason for not paying.*" (Italics ours.)

Then may we not ask why, when on January 22nd, 1921, the respondent bank stated in writing and in detail with accompanying documents the reasons why it would not pay its letter of credit, it did not state what Mr. Wharton, the cashier, swore was its reason when he took the stand in 1924? We submit the answer must be because the reason given by the witness in 1924, and then and since urged upon the Courts, was evolved after the Bank had stated its reasons for refusing to pay in January, 1921.

And let it be noted, with the Court's permission, that even then—as late as this testimony of Mr. Wharton in 1924—among the assigned reasons for refusing to honor its letter of credit is not to be found the claim that the sugar was not Java White Sugar.

The contention concerning substitution of steamers under these Lamborn contracts has been laid at rest.

> *H. O. Wilbur Sons & Company* v. *Lamborn*, 276 Pa. 479;
>
> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, and two other cases, 270 Fed. 325; affd. 10 Fed. (2d) 697; Certiorari denied 271 U. S. 683, 685, 686.

There never was anything in it and as the bank's letter of credit in this case contained no provision for declaration of steamers, it was absurd to add that stated ground for dishonoring this letter of credit.

Again, it became known to the bank at Norfolk that a contract for shipment from Java by steamer or steamers to Philadelphia did not cover the clearance or departure of the ship from Javan port or ports; that "shipment" in that sense meant loading on board. Hence the second alleged ground of refusal that because the *West Cheswald* did not *clear* from the last Javan port until October 17th, 1920, therefore shipment was not effected in September, in turn had to be abandoned.

What was left? Nothing but the invention of the alleged necessity of a *direct voyage* of the S. S. *West Cheswald* from Java to Philadelphia. Such was the one ground, *the theory of a direct voyage*, stated under oath by Mr. Wharton in 1924, and such is the real intent of the argument of the respondent at the bar of this Court.

It is interesting to observe that in Mr. Wharton's testi-

mony quoted on our opponent's brief at page 72 the words "direct voyage" are omitted. A paraphrase is used:

> "We understood our terms of the credit were that the shipment was to be *from Java to Philadelphia,* and that was our reason for not paying." (Italics ours.)

And in the brief of our learned opponent there is the same marked omission to use the words *"direct voyage,"* and the paraphrases adopted are: "a continuous intention" (p. 31), "a continuous shipment from Java to Philadelphia" (p. 31), and again "a continuous intention from the inception of the voyage to send the vessel to Philadelphia" (p. 31).

If counsel means a direct voyage, we beg leave to ask why he does not say so in plain English? Or is this case to be determined upon an alleged intention, *when as a matter of fact the S. S. "West Cheswald" did make a direct voyage from Java to Philadelphia?* For there is nothing in this letter of credit specifying a direct voyage or any other kind of a voyage *either westward or eastward,* while in respect to Philadelphia the Island of Java lies in the middle of the world in either direction.

The respondent insists upon a *direct voyage* from Java to Philadelphia. But as the letter of credit did not specify such voyage, the claim is camouflaged and resolves itself into an argument of original intent. We refer to page 31 of respondent's brief, where, after quoting the following statement made by District Judge GRONER on the first trial:

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia"

counsel says:

> "Why not?

> "This position can be completely answered in the language of the Supreme Court by saying that the buyer takes the risk of delivery or sea perils which may occur in the course of a voyage from Java to Philadelphia, but does not take the risk of delivery or disaster which may occur in the course of a voyage from Java to Port Said, and, upon the exercise of the option of the sellers, from Port Said to New York, and, by diversion from the latter voyage shortly before docking, to Philadelphia."

Passing by the fact that this argument is based on some alleged right of the buyer and not of the bank, it is one of the most perfect examples of *petitio principii* imaginable. What risk did this buyer run in respect to this sugar until it was delivered to him at Philadelphia? It was not his sugar until then. If the buyer could have insured its profits on its contract with Lamborn & Company, we point out and have demonstrated in our main brief, that insurance of profits under a contract of purchase and sale is a totally different *res* from insurance of goods afloat belonging to another man.

But what risk on a voyage from Java to Philadelphia is increased by a voyage from Java to Port Said, Port Said to New York and New York to Philadelphia? It is exactly like saying that a journey to Washington from New York is increased by the risk of the train stopping at Trenton, Philadelphia and Baltimore! *The places named in the argument are on the road to Philadelphia, and ports of call on the shortest route to that port from the ports of loading of this sugar in Java.*

If the foregoing quotation does not mean that the contention of the respondent in this case is that this ship must have made a direct voyage from the port of Samarang, Java, to Philadelphia, pursuing her solitary way through the ocean, stopping nowhere for mail, sup-

plies or bunkers, sailing without interruption the whole ten thousand miles up to the dock at Philadelphia, what does it mean?

But with the buyer, Southgate & Company, we made no such undertaking for a direct voyage. The shipment clause in the contract with Southgate & Company is word for word like the shipment clause in the letter of credit as amended. So that if this shipment clause in the letter of credit contains and implies no covenant for a direct voyage from Samarang, Java, to Philadelphia, it is vain to invoke the shipment clause in the contract with the buyer because it is literally the same as the contract clause of the letter of credit.

However, the learned counsel for the respondent does not quite come to the point of claiming a direct voyage in so many words. He means it, but not finding it in the letter of credit he dare not claim it. Hence the claim is disguised under nebulous expressions. We quote from page 31 of the respondent's brief:

> "And in further answer to the same suggestion that the requirement does not contemplate *a continuous intention and a continuous shipment from Java to Philadelphia*, in the language of the Supreme Court it can be said that the requirement of shipment from Java to Philadelphia 'defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer.'" (Italics ours.)

Here we have the basic idea of a direct voyage disguised under the phrase "continuous intention," and the more nearly approaching phrase "continuous shipment from Java to Philadelphia." Again we find the same language in the next paragraph (p. 31 of Respondent's Brief):

> "The uncertainty and confusion resulting from

> the conclusion that the contract did not require *a continuous intention from the inception of the voyage to send the vessel to Philadelphia* is well illustrated in this case." (Italics ours.)

Respondent's counsel then proceeds to recite the evidence by which the *West Cheswald*, when off the Jersey shore, was instructed to go into Philadelphia instead of into New York. And to conclude his contention on this, the very root of his argument, he recites the clause from the shipment clause of the letter of credit in italics as follows (p. 34):

> "during the months of August-September from Java to Philadelphia"

Misquoting it, we submit, because it reads (Rec., p. 107):

> "Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

When an argument must thus be put forward in disguise, and when to illustrate its point the crucial clause of the letter of credit must thus be modified, a certain lack of substance in the argument is demonstrated on its face.

But our learned opponent's argument seems to require something more than a paraphrase of the shipment clause. Apparently it has compelled counsel for the respondent to put back again into the letter of credit the clause which the parties by mutual consent eliminated therefrom, to wit:

> "and copy of Ocean Bill of Lading covering shipment Java to Philadelphia."

Of course it is out of the document and hence out of the case; but we do not attach any undue importance to that fact. The purchaser had not required exhibition of

the ocean bill of lading (see Contract, Rec., p. 112). It is quite obvious that the purpose of the elided clause was to supply proof of loading on board so that shipment within the stipulated months would thus be *prima facie* established.

As a matter of fact, plaintiffs made this proof by affidavit of Mr. Keen (Plaintiffs' Exhibit 21, Rec., pp. 136-137), and it is noteworthy that at the time of presenting their documents to the Bankers Trust Company, Lamborn & Company submitted to the Trust Company *a copy of the said ocean bill of lading* although they were under no possible obligation so to do (Rec., pp. 141, 156).

The fair conclusion from these facts is, we submit, that the form of words thus stricken from the letter of credit were intended and understood by both the Bank and the plaintiffs to be some sort of evidence of shipment, as to which fact other evidence was made and accepted for the sake of convenience.

Be this as it may, there being no evidence or testimony as to the motives or reasons for the excision of that clause from the letter of credit, it may be that no conclusion as to the reasons therefor would be drawn by the Court. In either event it is impossible, we submit, for counsel for the respondent to use the stricken out clause as a foundation for any part of his argument in this case.

It is extremely pertinent, we believe, for us to point out that before the defendant Bank formulated in circumstantial detail its stated grounds for refusing to honor the letter of credit (Plaintiffs' Exhibit 230, pp. 151-152), the Bank had as much knowledge as the plaintiffs had concerning the voyage of the *West Cheswald*. It stated that knowledge on December 27th, 1920, in its telegram to the Bankers Trust Company (Plaintiffs' Exhibit 36, page 143) wherein the Norfolk Bank said:

> "we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eight, calling at Mascassar then Borneo and finally back to Samarang from whence sailed for New York October seventeenth *further that this ship was diverted to Philadelphia though originally intended for New York*"

So the Bank knew all about the voyage of the *West Cheswald* as early as December 27th, 1920. Knowing it, it did not claim that the shipment covered by this letter of credit was required to be from Java to Philadelphia. It did not claim that the fact that the *West Cheswald* sailed from New York and was diverted to Philadelphia, was one of its grounds for refusing to pay its letter of credit. It never claimed either of those things until it came to file its so-called "Supplemental Statement of Grounds of Defense" on October 23, 1923.

For the same telegram of December 27th, 1920, continues from where we last left off as follows:

> "our credit specifically calls for shipment from Java August or September and Lamborn's *failure to comply with this important requirement compels us to refuse payment* moreover our client has shown us letters indicating their sugars loaded on steamer *Chifuku Maru* which has never arrived." (Italics ours.)

This telegram is not difficult to construe or obscure in meaning. It states very plainly

> "our credit specifically calls for *shipment from Java* August or September and Lamborn's failure to comply with this important requirement compels us to refuse payment." (Italics ours.)

Then is added the subject-matter of the previous declaration of the *Chifuku Maru*. Hence the telegram is the

forerunner of the formal statement of grounds of refusal to pay dated January 22nd, 1921; and both papers state the same grounds.

The point we are making is that they both state the same grounds, but that neither of the grounds stated sets forth that the diversion of the *West Cheswald* from New York to Philadelphia was a ground for refusal to pay, or that the ocean bill of lading of this sugar on board the *West Cheswald* not showing transportation to be direct from Java to Philadelphia, was ground for the refusal to pay, *although the respondent was well aware of both circumstances when it formulated its grounds for refusing to pay.*

Let us remember that these were Lamborn's sugars while on the high seas. They were Lamborn's sugars until unloaded and until weighed, until duty was paid upon them, and until they were placed f. o. b. railroad cars consigned as written. Let us remember that Lamborn & Company had the right to bring them to Philadelphia by one or more steamers. Let us remember that the bank had no risk at all in the movement of the goods. Let us remember that the buyer had no risk at all in the movement of the goods. Its liability to pay arose only and when this sugar was placed free on board railroad cars in the port of Philadelphia. Let us remember that as a matter of fact, in good faith, without delay, these sugars were shipped on board a steamer in Java and taken—carried direct—to Philadelphia. With those facts in mind we submit to the Court that the argument of the respondent does not deal with facts but with theories. It belongs not to the domain of commercial law, but to the metaphysics of theology.

And we respectfully beg to submit that in view of that undoubted fact, the reason why every Court in the United

States, except the Court below herein, has rejected the same argument as that now made by the respondent at this bar, is obvious; and this Court refused by writ of certiorari to review the contrary decisions rendered by the United States Circuit Court of Appeals, Second Circuit:

> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, and two other cases, 276 Fed. 325; aff'd 10 Fed. (2d) 697; Certiorari denied, 271 U. S. 683, 685, 686.

At the time those certioraris were denied by this Court, this conflict between the decision of the Fourth Circuit in the case at bar and the decision of the United States Circuit Court of Appeals, Second Circuit, and all the other decisions in the State and Federal Courts, existed.

The decision of the Circuit Court of Appeals, Fourth Circuit, would invalidate every shipment f. o. b. named destination and named place of shipment, where the seller, honestly intended to fulfill his contract and having the means to do so, used goods of the same kind, shipped at the same time, shipped from the same place, on the road and route to the place of destination, used them to perform his contract when the original shipment destined for the particular buyer was lost in transit or delayed by accident.

To illustrate what we mean: Assume that a potato grower in Aroostook County, Maine, agreed to ship by rail from Weeksboro to Portland, and deliver there f. o. b. cars a freight car of potatoes. Assume that the shipment was to be made in the first week of October; that in that same week he had also made a shipment of another car of potatoes to his warehouse in Augusta, which car stood on a siding in that city. Assume that the freight car

loaded with the potatoes for the buyer at Portland was derailed and its contents destroyed. The rule invoked by the respondent in this case would make it impossible for the shipper in Weeksboro to wire to Augusta to hitch the carload of potatoes waiting on a siding there to the next through freight train and carry it to Portland to make delivery, *because forsooth as to that particular carload in reserve he had not had the original intention to send it to Portland.* In short, that an accident or casualty would *compel* the seller to break his contract, although at the very moment he had it in his power to perform it.

So that if Lamborn & Company could not make delivery from the *Chifuku Maru,* they would break the contract, and if they tried to use the sugar on the *West Cheswald* they would also break the contract; hence owing to the casualty to the *Chifuku Maru* the law would *compel* them to break the contract.

To that result indubitably the argument of the respondent in this case arrives.

POINT TWO.

The rules of law appertaining to cost, insurance and freight contracts, point of shipment to point of destination, can not be used to sustain the respondent's argument; nor can cases where some plain provision of the purchase and sales contract was violated, be cited in support of the judgments below.

Respondent's brief is given an air of great respectability, even of authority, by profuse quotations from the writings and discourse of eminent judges in rendering decisions in certain cases. But this Court has been careful to point out that the authority of a decision depends

not upon the statements by way of argument or otherwise of the writer of the opinion, but by the facts of the case before the Court and the decision rendered upon such facts. Thus as early as the case of *Cohens* v. *Virginia*, 6 Wheat. 265, at page 399, Chief Justice MARSHALL laid down the rule as follows, referring to certain dicta of the Court in the case of *Marbury* v. *Madison*:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

A similar announcement is found in the Court of Appeals of the State of New York in *Leroy B. Crane* v. *James Gordon Bennett*, 177 N. Y. 106, where Judge MARTIN stated at page 112:

> "As was said by the learned writer of that opinion in *Colonial City Traction Co.* v. *Kingston City R. R. Co.* (154 N. Y. 493, 495): 'It was not our intention to decide any case but the one before us, * * * and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made, by way of argument or otherwise, than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the

> court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance.' (*Stokes* v. *Stokes*, 155 N. Y. 581, 594; *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 551.) It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different."

With these principles in mind we proceed to set forth the basic facts and the actual decision in the several cases cited in respondent's brief.

Ledon v. *Havemeyer*, 121 N. Y. 179 (1890).

Here was a contract c. & f. Cuba. The buyers were to provide marine insurance. The contract did not specify either the place of shipment or the place of delivery; but the Court said:

> "It is implied by this language, and the surrounding circumstances, that the shipment was to be made in Cuba, upon a vessel bound for New York."

In other words, because it was a c. & f. contract, and because the buyers were to provide marine insurance, it was to be implied that the vessel should be bound for New York.

The question involved in the case was whether, in view of the provision of the contract requiring "shipment within thirty days" the vessel was to *clear* within such period. That was the only ground of objection made by the buyer at the time, and the real point argued before or considered by the Court.

Iasigi v. *Rosenstein*, 141 N. Y. 414 (1894).

In this case the contract required "shipment from Turkey." All the Court held was that the seller should not have his complaint dismissed because he showed that the goods had been transshipped at London, and that he was entitled to introduce evidence that such transshipment was customary and indeed necessary in order to get the goods from Turkey to New York.

Firemen's Insurance Co. v. *Lawrence*, 14 Johnson 46 (1816).

This was an action by a ship owner to recover for the loss of a vessel insured by the defendant insurance company. Defendant claimed that at the time the loss occurred the vessel was engaged upon a different voyage from that for which she was insured. It appeared that those in charge of the vessel had formed an intention to go to a different port from the one named in the insurance policy; but while she was on the high seas, and before such diversion had been carried into effect by entering upon a changed course, the loss occurred.

There was judgment below in favor of the insured against the insurance company.

Upon appeal the Chancellor wrote a long opinion appearing between pages 54 and 62, in which he reached the conclusion that the judgment of the Supreme Court should be reversed. It is from this opinion that respond-

ent's counsel has quoted. Seven senators concurred with the Chancellor.

But Senator Barker thought the judgment should be affirmed because there had been a mere intention to deviate and no actual deviation of the voyage. Fourteen senators concurred with him, with the result that by a vote of fifteen to eight the judgment of the Supreme Court in favor of the insured and against the insurance company was affirmed.

Not only has the respondent's counsel, therefore, argued upon the dissenting opinion in the case, but also this decision is a strong authority in support of our contention that a vessel's voyage is determined not by the course which is intended to be taken but by the one which it actually takes, and squarely supports Mr. Justice WAGNER and the Supreme Court of Pennsylvania, and the other cases cited by us in our main brief.

Woodruff v. *Noyes*, 15 Conn. 335 (1843).

In this case the goods were shipped pursuant to a contract of purchase which contained the direction

"Please ship to the care of F. W. Bushnell"

This person apparently resided or did business in Norwich, Connecticut. The purchaser, Chollar, resided or did business in Brooklyn, Connecticut. We quote from the report: "On the 27th of November, 1839, the plaintiffs shipped the castings so ordered, by a vessel bound to Norwich, then at Hartford; this being the usual mode of transportation. They were directed to Justus Chollar, Brooklyn; but not to the care of F. W. Bushnell, Norwich; and bills of lading were given accordingly. The castings arrived at Norwich, on the 28th of November, and were immediately taken, by one Perry, without the knowledge of Bushnell, and carried to the railroad depot, to be trans-

ported in the usual way of conveying goods from Norwich to Brooklyn, and were duly entered for that purpose." The report goes on to say that while the castings were lying there (apparently meaning Norwich), the purchaser became insolvent, and various creditors attached the goods as goods of the purchaser, Chollar. The plaintiffs, against these creditors, claimed that they had the right to stop the goods *in transitu* as they had never been delivered to Chollar. The question of fact left to the jury was whether Perry, the truckman, had been authorized by Chollar to receive the goods and transport them, or cause them to be transported, to Brooklyn; or as stated by the learned Court:

> "The only question of fact, therefore, controverted between the parties, as to this part of the case, was, whether Chollar authorized Perry to act merely as a truckman, or common carrier, to transport the property from the place where it was landed; or whether he conferred upon him, in addition to this, a general authority to take charge of all the goods which should be sent to him at Norwich, which would, of course, include the property in question. This question of fact was distinctly submitted to the jury, with instructions, that if Perry was Chollar's general agent to take charge of all the goods sent to him, he might accept them; but if he was employed merely as a truckman, or common carrier, he would have no authority to waive any objection which Chollar might make because they were not sent as directed."

The jury found for the plaintiff, and the judgment entered on the verdict was affirmed.

Here then was a case where because the goods had not been sent as directed by the contract, title did not pass from the seller unless the purchaser waived the omission

to conform to the contract. The jury held that he had not so waived.

Jones v. *Schneider*, 22 Minn. 279 (1875).

Here the contract contained specific provisions as to the manner of transportation:

> "You will please ship to me from the factory to Bass Lake station, care of J. H. Lohman, on or before the 1st day of July, 1874, one of the Marsh harvesters, for which I agree to pay you or your agent, in cash and notes, on the arrival of the machine," etc.

The report of the case states: "At the time when the order was given, plaintiff's agent agreed to sell and ship the harvester in accordance with the terms of the order. Plaintiffs shipped a lot of harvesters from the factory to Minneapolis, without selecting any particular one for defendant, and on June 26, 1874, shipped one of the lot from Minneapolis to Bass Lake station, where it arrived as early as some time in July, 1874, *but there is no evidence tending to show that defendant was ever made aware of the arrival of the harvester at the station mentioned, or that it was ever delivered to him.*" (Italics ours.)

The action was one for *goods sold and delivered*; but the Court held that this did not constitute a delivery; hence that the suit could not be maintained. That situation is entirely foreign to the one presented here.

> *California Prune and Apricot Growers, Inc.* v. *Baird & Peters*, 1926 Canada Supreme Court 208.

In this case it should be noted that the seller was to make delivery of the prunes "f. o. b. Pacific Coast rail shipping point," and that they were shipped from Red

Bluff, California, but on the Canadian Pacific Railway instead of over the Canadian National Railways. Here, therefore, the goods were to become the goods of the purchaser on being loaded on board railroad cars at Pacific Coast shipping point. The purchaser had the right, therefore, to stipulate upon what line and by what route his goods should be carried to him. He was vested with the right of insurance in the goods from the moment they were placed f. o. b. railway cars California. They were his goods. Thus the contract specified in detail the particular kind of bill of lading which the seller was obliged to take out. The seller took out a different bill of lading over a different route. In an action by the seller to recover the purchase price it was very naturally held that there had never been a delivery and that the seller could not recover.

Filley v. *Pope*, 115 U. S. 213 (1885);
Norrington v. *Wright*, 115 U. S. 188 (1885).

Respondent has placed its chief reliance upon these two cases. Neither of them is applicable to the situation at bar; but since we have discussed them fully in our main brief we think it is unnecessary to say anything further here.

Bowes v. *Shand*, 2 Appeal Cases 455 (1877).

The only question argued or discussed was whether the sellers had performed their contract when it was shown that they had loaded substantially all of the rice on board prior to the commencement of the contract period.

Lowber v. *Bangs*, 2 Wall. 728 (1864).

The stipulation in the charter party here was very different from that in the Lamborn contract. It said:

"The ship to proceed from Melbourne to Calcutta with all possible dispatch."

It was conceded by both parties that the vessel had not proceeded from Melbourne to Calcutta with all possible dispatch, and it was shown that on the contrary she had gone from Melbourne to Manila and thence to Calcutta, arriving some three months later than she should have done. The question in the case was whether the quoted provision was a representation or a warranty, and the Court held that it was the latter.

Hansson v. *Hamel and Horley, Ltd.* (1922), 2 App. Cas. 36.

Again this was a c. i. f. contract from Norway to Kobe or Yokohama. The goods were transshipped at Hamburg. The bill of lading tendered was that of the second carrier, but the bill of lading of the initial carrier was never tendered. In other words, the bill of lading covered only a part of the voyage.

Landauer & Company v. *Craven & Speeding Bros.* (1912), 2 K. B. D. 94.

This was a c. i. f. contract, from the Philippine Islands to London. The bill of lading tendered was from Hongkong to London.

Thus it will be seen that in every one of these cases (except *Lowber* v. *Bangs* and *Firemen's Insurance Co.* v. *Lawrence*), the contract was one under which property in the goods was to pass to the buyer at the point of shipment or that the particular kind of contract of carriage which the seller was to procure was specified in detail. The question raised in one form or another was simply whether or not the seller had taken out the contract of carriage required.

POINT THREE.

Respondent's contention that the documents were insufficient because the railroad bill of lading described the goods as "Java Sugar" instead of "Java White Sugar" (although the invoice presented so described them) is unsound and is not available to the respondent upon this appeal.

At the foot of page 5 of respondent's brief it is argued that Lamborn & Company's papers presented to the Bankers Trust Company were insufficient because the only document which termed the goods "Java White Sugar" was the invoice prepared by Lamborn & Company. The argument is developed by the respondent between pages 60 and 64.

This contention was raised for the first time in the defendant's answer or supplemental statement of grounds of defense as amended on October 23rd, 1923, and was argued upon the first appeal. It was not argued upon the second appeal, nor did the Circuit Court of Appeals, Fourth Circuit, advert to the claim in either of its two opinions.

We submit that the purpose of this argument is to attempt to bring this case within the decision of the Court of Appeals in *Lamborn* v. *Lake Shore Banking & Trust Company*, 231 N. Y. 616, a case wherein the New York courts granted the motion of the Lake Shore Banking & Trust Company to vacate an attachment sued out by Lamborn & Company in New York State.

But the decision has no application. In the first place the letter of credit there provided that it should be

> "available by your drafts at sight against bills of lading for 550 bags Java White Granulated Sugar"

while here there is no provision in the letter of credit

susceptible of a construction requiring the railway bill of lading to describe the goods as Java White Sugar.

In the second place, in a later case, *Bank of Italy* v. *Merchants National Bank*, 236 N. Y. 106, the New York Court of Appeals qualified the rule previously laid down in the *Lake Shore Banking & Trust Company* case, and expressly exempted from such rule four classes of cases as follows:

> 1. If the words used in the guaranty and in the bill of lading were as a matter of common knowledge synonymous.
>
> 2. If the guaranty covered a certain class of objects and the bill was for one species of that class.
>
> 3. If the course of dealing between the parties had been such that they might be held as a matter of law to have affixed their own meaning to the terms employed.
>
> 4. If the dispute as to the identity of the terms was not substantial.

In the third place the question of Lamborn & Company's right to recover against the Lake Shore Banking & Trust Company, and its successor, is now pending undetermined before the United States Circuit Court of Appeals, Sixth Circuit.

Moreover, it is settled law that a description of the goods need not be contained in any particular document or documents; it is enough if the complete description of the goods can be spelled out from all the documents presented to the bank by whomsoever prepared:

> *Laudisi* v. *American Exchange National Bank*, 239 N. Y. 234;
>
> *Border National Bank* v. *American National Bank*, 282 Fed. 73, 80;
>
> *O'Meara* v. *National Park Bank*, 239 N. Y. 386.

But the point is not now available to the respondent because the bank did not base its refusal to pay on this ground. It is estopped now to assert the objection.

Railway Co. v. *McCarthy*, 96 U. S. 258;
International Banking Corp. v. *Irving National Bank*, 274 Fed. 122, affirmed 283 Fed. 103;
Bank of Taiwan v. *Union National Bank of Philadelphia*, 1 Fed. (2d) 65;
O'Meara Co. v. *National Park Bank, supra;*
Lamborn v. *National Park Bank*, 240 N. Y. 520.

POINT FOUR.

Respondent's argument in support of the refusal of the District Court to introduce evidence of custom and usage as to the meaning of the shipment provision in this letter of credit is unsound.

We had not intended to argue the error of the District Court in refusing to permit us to amend our notice of motion for judgment and to introduce evidence of custom and usage; but since the respondent has devoted some eight pages of his brief to the argument (Brief, pp. 64-71) we beg leave to comment on it briefly:

The respondent's argument is summed up in its brief at page 68 as follows:

> "The Circuit Court of Appeals had decided in this case what the parties meant by the language they used, and it followed that it was not permissible to vary the same by the claim of an existing usage or custom to the contrary."

But the case is now in the United States Supreme Court. It is not decisive here what the Circuit Court of Appeals decided the parties meant. The decision of that Court is not binding on this Court. The case is in the same position as if it at the very outset before the first trial

we had attempted to allege and offered to prove this custom and usage which we claim exists, but the allegations of our pleading had been stricken out and our evidence rejected.

It was error to refuse to permit us to make the amendment and to reject our evidence as to the meaning in the trade of the disputed expression of the contract and letter of credit.

See the following cases where evidence of custom and usage was received (or held to have been erroneously excluded) as to the meaning and construction of phrases relating to the shipment, transportation or delivery of merchandise.

Hostetter v. *Park*, 137 U. S. 30: "to be delivered without delay."

Bradlee & McIntosh Co. v. *Frey & Son*, 280 Fed. 375: "Shipment: From source during April and May, expected to arrive in New York June and July."

Vietor v. *National City Bank*, 200 App. Div. 557: "shipment."

Maes & Co., Inc. v. *Grace & Co.*, 239 N. Y. 519: "ex ship."

Law v. *Cross*, 66 U. S. 533: "afloat."

Ruttonjee v. *Frame*, 205 App. Div. 354 affirmed 237 N. Y. 115: "afloat."

Iasigi v. *Rosenstein*, 141 N. Y. 414: "March steamer shipment from Turkey * * * goods to be taken from dock on arrival of steamer."

Harrison v. *Fortlage*, 161 U. S. 57: "ex ship."

Bowes v. *Shand*, 2 L. R. App. Cases 455: "to be shipped at Madras or coast, for this port, during the months of March and/or April."

POINT FIVE.

The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER,, surviving partners of the copartnership of Lamborn & Company, *Petitioners* (Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States, *Respondent* (Defendant Below).

BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

TAZEWELL TAYLOR,
Counsel for the National Bank of Commerce of Norfolk, Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER,, surviving partners of the copartnership of Lamborn & Company, *Petitioners* (Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States, *Respondent* (Defendant Below).

BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

I. INTRODUCTION.

Lamborn and Company, the Petitioners herein, as plaintiffs, instituted an action at law against The Na-

tional Bank of Commerce of Norfolk, the Respondent, as defendant, in the United States District Court, Eastern District of Virginia, at Norfolk, and upon the trial of the same and after all the evidence in the case had been submitted to the jury, upon motion of the plaintiffs the trial court directed the jury to render a verdict in favor of the plaintiffs in the sum of $48,009.81, with interest thereon at the rate of six per cent per annum from January 7, 1921, until paid, for which amount, after allowing a credit of $7,019.13, as of, and with interest thereon at the rate of six per cent from October 28, 1921, a judgment was rendered by the Court, together with costs. (R. 6-7)

To this judgment a writ of error was awarded by the Circuit Court of Appeals for the Fourth Circuit and, upon hearing in that Court on appeal, the judgment of the United States District Court was reversed, and a new trial awarded on October 22, 1924 (R. 86). The opinion of the Circuit Court of Appeals, rendered October 21, 1924, is reported in 2 Fed. (2) 23, and is also found on page 74 *et seq.* of the Transcript of Record filed herein.

Upon the remanding of the case to the District Court, a new trial was had and at the conclusion of all the evidence on motion of counsel for the defendant, respondent herein, the trial court directed a verdict in favor of the defendant, and the same was accordingly returned by the jury, on which verdict a final judgment was rendered June 5, 1925 (R. 101).

To the latter judgment a writ of error was awarded by the Circuit Court of Appeals for the Fourth Circuit and, after argument of counsel in the latter court, the judgment of the trial court was affirmed on October 25, 1926 (R. 209).

The opinion of the Circuit Court of Appeals, rendered October 19, 1926, is found in 15 Fed. (2) 473, as well as on page 206 *et seq.* of the Transcript of the Record filed herein.

On February 28, 1927, this Court entered an order herein (R. 210), allowing a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review the judgment of that Court.

II. STATEMENT OF FACTS.

At the instance of Southgate and Company, wholesale grocers and distributors, with their principal office in the City of Norfolk, the respondent, The National Bank of Commerce of Norfolk, issued a certain letter of credit in favor of the petitioners, Lamborn and Company, in the following words and figures (R. 8):

"THE NATIONAL BANK OF COMMERCE
OF NORFOLK
LETTER OF CREDIT NO. 105.
NORFOLK, VIRGINIA, May 11, 1920.

Lamborn & Company,
132 Front St.,
New York.

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by: T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three Thousand One Hundred Twenty-Three Dollars and Eighty-Four Cents ($53,123.84).

Covering: 1000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugar at 22 cents per pound, less 2 per cent duty, paid f.o.b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in Force: January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly,
A. E. WHARTON,
Assistant Cashier."

By subsequent correspondence between all parties concerned it was agreed that from the section denominated "Documents" in the original letter of credit there should be eliminated the requirement of copy of ocean bill of lading covering shipment from Java to Philadelphia (Plaintiffs' Exhibits 27, 47, 28, R. 107-109), but all other terms and conditions in the letter of credit remained as originally set out.

Among the terms and conditions of the letter of credit which thus remained was the provision as to the time and method of shipment. This was the subject of a separate paragraph entitled "Shipment," wherein it was provided:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The petitioners' evidence showed that the sugar which was finally tendered by the petitioners under the

letter of credit was shipped on the Steamship "WEST CHESWALD." As will be seen from the evidence this vessel was loaded on the Island of Java at a time more or less indefinite, and, as shown by the ocean bill of lading which the petitioners introduced to evidence the transaction, she was at the time of sailing destined to Port Said with option to New York, and never to Philadelphia. (R. 114-116.)

The evidence shows that on the 13th of December, 1920, this vessel was in the Atlantic Ocean proceeding on her way to New York, and, at the instance of the petitioners, Lamborn and Company, and upon the paying of an extra freight charge of $1.00 per ton for the freight in her owned by them, this vessel was diverted from New York, her original destination, and ordered in to Philadelphia. This is clearly shown by the testimony of Mr. N. Nelson Keen, a member of the petitioner's firm, testifying on their behalf:

> "It was a fact that she was on her way to New York when she was diverted. If we hadn't diverted her she would have come to New York.
>
> Q. And prior to December 13th, 1920, she was never destined to Philadelphia?
>
> A. Not at that time, no, sir." (R. 47)

It was also shown from the evidence that while the letter of credit covers Java White Sugars (R. 8), yet the order notify railroad bills of lading required by the contract and tendered by the petitioners (R. 137), upon which payment under the letter of credit was demanded, showed simply a shipment of Java Sugar and consequently the petitioners failed also to show a compliance with the letter of credit in this essential regard.

These two points were relied upon by the respondent at the first trial, but its contention was not sustained and the verdict was directed in favor of the petitioners. Upon the reversal of the trial judge's action on appeal the matter was then remanded for a new trial, in which a verdict in favor of the respondent was then directed, which action of the trial court was sustained on appeal, and to the final judgment of the Circuit Court of Appeals on the second appeal this Writ of Certiorari was granted. The real question for decision, however, is the correctness of the judgment of the Circuit Court of Appeals on the first appeal. (R. 86, 87.)

The grounds upon which the Circuit Court of Appeals relied in entering this judgment are set out at length in the opinion of Judge Rose, 2 Fed. (2) 23 (R. 74).

The reasons given for his conclusion are stated with his characteristic force and cogency and great reliance is placed thereon by the respondent.

III. CONSTRUCTION OF THE CONTRACT EVIDENCED BY THE LETTER OF CREDIT.

There is nothing novel or intricate in a letter of credit *per se*. It is a contract subject to the same rules of construction and fraught with the same general consequences as other contracts.

As said by Lord Brougham in Orr v. Bank, 1 Macq. H. L. Cas. 513:

> "I am inclined to think that there is no very great novelty or peculiarity in letters of credit to take them out of the general law applicable to mandates. I am not aware that there is anything in the mercantile law, or the custom of merchants

to distinguish letters of credit from any other authority to pay money."

The general subject was under discussion in Bank of Montreal v. Recknagel, 109 N. Y. 482.

The facts of this case were briefly these:

Defendants authorized plaintiff, a foreign bank, to allow a foreign firm to draw for defendants' account against a certain number of bales of Manila hemp, to be purchased and shipped by a certain vessel, advice to be given plaintiff, accompanied by a bill of lading, with abstract of invoice indorsed thereon for the property shipped. Plaintiff accepted, and cashed drafts against "bales of hemp." An abstract of invoice for "bales of Manila hemp" was indorsed on each bill by the consignor after it had been signed by the captain, but without his knowledge. A letter of advice described the shipment as "bales of hemp." The foreign firm failed and absconded, and most of the shipment proved to be matting only; the rest being Manila hemp.

In a unanimous opinion the Court of Appeals makes the following common sense comment upon contracts of this description:

> "Under the agreements effected between the plaintiff and the defendants for the extension of the credit to Vogel & Co., the defendants only became liable to plaintiff to provide for drafts accepted by its London agents within the precise terms upon which the credit was opened. The credit was authorized upon certain conditions prescribed by the parties to be ultimately bound, which they not only had the right to make, but which were assented to by the plaintiff. It is difficult to see how parties could more particularly define the terms of their engagements than was

done in this case * * * In making their arrangements with the plaintiff, the defendants had the right to surround themselves, as to their advances through the plaintiff's agency, with all the safeguards which the nature of the case admitted. The effect of their stipulating in respect of acceptances by plaintiff of Vogel & Co.'s drafts was to protect themselves, as far as was possible, against any unauthorized acts of Vogel & Co. Every lawful provision or condition in the contracts of parties should control, and should not be disregarded in the determination of their rights, if it can be deemed to have entered into the contract with any definite or perceptible purpose. In interpreting their agreements, and in determining the respective obligations, based upon their writings, courts should look at the surrounding circumstances, the situation and relations of the parties, and the subject-matter of their negotiations. In that way, the intention, where there is any uncertainty, is better given effect, and their undertaking is more certain to receive a reasonable and fair interpretation. But when the agreement is determined into which the parties have entered, it is but just and fair that they should be held strictly to it, and all their stipulations we should assume to have been made for a purpose, and to have been considered important by them, and therefore cannot be dispensed with. Hill v. Blake, 97 N. Y. 216. In Banks v. Taaks, 101 N. Y. 442, 5 N. E. Rep. 76, Andrews, J., speaking of the effect of a letter of the defendants, undertaking to accept the drafts of certain parties, said (page 449): 'Assuming that it was a general letter of credit, * * * it nevertheless amounted simply to a contract on the part of Taaks & Lichtenstein to pay advances made in conformity therewith. They had a right to stand upon the very terms of their contract, and they were not bound unless the condition upon which their obligation depended was ful-

> filled.' In Bank v. Griswold, 72 N. Y. 472, Church, C. J., said (page 479): 'It is doubtless true that when the right to draw is limited in amount, or is dependent upon the condition of the performance of some act, or that certain facts exist, it must appear that the draft was within the limit, or that the act constituting the condition has been performed, or the facts exist.' "

For the purpose of the present case the contract between Southgate and Company and Lamborn may well be eliminated, and let it be noted that the position of the respondent is in nowise based thereon.

The contention of the respondent is that Southgate and Company, desiring to purchase certain sugar, caused the National Bank of Commerce of Norfolk to issue the letter of credit in question to and in favor of Lamborn and Company; that thereby the Bank became obligated to Lamborn and Company, subject, however, to the terms and conditions of the letter of credit; that Lamborn and Company by accepting the letter of credit undertook and agreed to perform those terms and conditions as a prerequisite to collection on the letter of credit, and that the Bank in turn relied on the representations of Lamborn and Company, the persons in whose favor the credit was issued, that such terms and conditions would be complied with.

From the relationship of the parties thus created it became absolutely necessary, in order for the Bank to claim reimbursement from Southgate and Company, that it should show that it had paid Lamborn only when the latter had strictly complied with the provisions of the letter of credit. Anything short of this would have imposed an ultimate liability upon Southgate and Company without their consent and contrary to the undertaking of the parties.

It will thus be seen that the position of the respondent is in no sense dependent upon any independent agreement between Southgate and Lamborn. What the respondent contends is that Lamborn was to make a tender of the sugar which, in every way, met the requirements of the contract evidenced by the letter of credit, both as to amount and quality, as well as time, place and manner of shipment and ultimate destination. Failing in this Lamborn could not hold the Bank liable on the letter of credit, and the Bank in turn, upon ignoring the requirements of the letter of credit, which had been procured by Southgate, and by paying Lamborn when the latter had failed to comply with those terms, could not look to Southgate and Company for reimbursement. It is therefore apparent that the action of the Bank in requiring strict performance by Lamborn of the terms provided in the letter of credit was not dictated by whim or caprice, but by a recognition of the necessity, when it came to collect from Southgate, of showing that it had paid only in accordance with the terms of its contract which Southgate and Company had procured from it. Such a rule is only in accordance with the principle laid down in Bank v. Griswold (*supra*), wherein the Court uses the following language:

> "It is doubtless true that when the right to draw is limited in amount, or is dependent upon the condition of the performance of some act, or that certain facts exist, it must appear that the draft was within the limit, or that the act constituting the condition has been performed, or the facts exist."

The Bank insists upon the application of the principle embodied in this well recognized rule. As will

be hereafter shown, Lamborn and Company have failed to comply with the terms of the letter of credit under which they claim and consequently are not entitled to recover thereon against the respondent.

IV. THE CONTRACT REQUIRED THAT SHIPMENT WHEN MADE SHOULD BE FROM JAVA TO PHILADELPHIA.

A. State Courts Uphold Respondent's Position.

The Contract Provides:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

There is also a provision as to what documents should be furnished when payment is demanded on the draft. This provision is as follows:

> "Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached."

The requirement to furnish "Copy of Ocean Bill of Lading covering shipment Java to Philadelphia," was subsequently dispensed with. (R. 107-109.) Dispensing with this requirement did not, however, change the character of shipment as regards manner, time, place, destination or otherwise, but the change was prompted alone by the supposed inconvenience of furnishing so many copies of a voluminous document, there being a large number of lots of sugar consigned to different customers of Lamborn & Company.

In the letters permitting the omission of the copy of the ocean bill of lading it is provided as follows:

> "All other terms and conditions of this credit are to remain unchanged." (R. 107-109.)

It will thus be seen that the obligation of Lamborn and Company was changed in no particular except in the one matter of furnishing a copy of the Ocean Bill of Lading. They were still obligated to ship the sugar to Philadelphia in the months specified and from and to the places specified, and the original Ocean Bill of Lading was not to be changed in any particular. Otherwise it would have been impossible to furnish a "Copy of Ocean Bill of Lading covering shipment Java to Philadelphia."

The Ocean Bill of Lading contemplated to be issued at the inception of the shipment necessarily had to specify the termini of the voyage—Java to Philadelphia. It therefore followed that in order for the sugar tendered by Lamborn and Company to meet the requirements of the letter of credit it must have been sugar that from the time of shipment in Java was impressed with an ultimate and unconditional destination in Philadelphia. Otherwise how would it have been possible to obtain an Ocean Bill of Lading covering shipment from Java to Philadelphia?

The Bill of Lading of the Steamer "WEST CHESWALD", which was actually produced when payment was demanded (R. 114-116), shows that it was a shipment from Java to Port Said, option New York, and never to Philadelphia.

Ledon v. Havemeyer, 121 N. Y. 179.

This was a contract for the sale and purchase of sugar made in New York, where the vendees resided, the vendors being residents of Cuba, and the sugar was intended to be shipped from some port in that island to the defendants in New York. It will thus be seen that the contract in question so far as the ultimate destination of the sugar was concerned was identical as to requirements with that in the present instance. In other words, in one case the sugar was to be shipped from Cuba to New York, and in the other the shipment was to be from Java to Philadelphia.

This case is illuminating as showing that this requirement could only be met by a shipment of the sugar on a vessel destined at the time of shipment for New York. In other words, that the goods sold should be loaded in Cuba on a vessel bound for New York with the intent in good faith to have them cleared for the port of destination.

The following language from the opinion fully substantiates this statement:

> "This contract, like all others, must be construed with reference to the intent of the parties making it, and if its language is plain and unambiguous, it must be given that construction which the language fairly imports, and the question of its meaning is a question of law for the court. *That meaning, we think, is the putting the goods sold on board a vessel bound for New York, with the intent in good faith to have them cleared for the port of destination in the regular course of trade,* or in a reasonable time after the shipment."
>
> * * * * * * * * *
>
> "It is, of course, implied by this language, and the surrounding circumstances, that *the shipment*

was to be made in Cuba upon a vessel bound for New York, and if there was no regular line making trips to the port of destination from the shipping port, that the plaintiffs would supply, in some way, the means of transportation to perform the service required."

* * * * * * * * *

"We think the plaintiffs, under this contract, were not required to hire a special ship for the purpose of transporting the goods, if that object could be otherwise reasonably attained; *but they, undoubtedly, would be bound to ship on some vessel destined for the Port of New York,* which they had reason to suppose would sail within a reasonable time after shipment had been made." (Italics ours.)

It will thus be seen that the requirement of the contract is a fixed destination of the vessel at the time of shipment, and not a destination that may later be determined upon by the sellers long after the vessel has sailed, without the consent of the buyer, to meet the caprice, whim, or selfish interest of the sellers.

Iasige v. Rosenstein, 141 N. Y. 414.

In this case the contract provided for "March steamer shipment from Turkey." The goods were shipped upon a steamer sailing from Turkey in March, but were transshipped at Liverpool and brought to New York in another vessel. The question involved was whether or not the contract required a direct and unbroken voyage. In disposing of this question the Court uses the following language:

"Observe the language of primary description, that intended to identify the goods, and prescrib-

ing the date and character of the first shipment. There are two elements provided: First, the property bought is to be 'good merchantable Smyrna canary seed,' and, second, 'March steamer shipment from Turkey.' That ends the description of what was agreed to be bought, for the note goes at once to the question of price, and other details of the contract. *Plainly, for some reason, the parties contented themselves with saying simply 'shipment from Turkey,' and omitted to add 'to New York,' or other words indicating a direct or unbroken voyage; and this omission occurs in the formal description of the goods, and where it was not to be expected if a direct voyage was meant.*" (Italics ours.)

There is but one conclusion to draw from this opinion and that is that had the contract provided for "March steamer shipment from Turkey to New York," it would have required a direct and unbroken voyage. By the same token a requirement of "September shipment Java to Philadelphia" required a like direct and unbroken voyage from Java to Philadelphia.

Firemen Insurance Company v. Lawrence, 14 Johnson (N. Y.) 56.

This was a suit on a marine policy where there had been an abandonment of the original voyage and the substitution of another port in place of the original terminus *ad quem*. The Court said:

"A voyage imports a definite commencement and end. It is known and characterized by its *termini*. They are the recognized tests of its identity.

* * * * * * * *

> But if the original place of destination be abandoned, in order to go to another port of discharge, the voyage itself becomes changed, because one of the *termini* of the original voyage is changed. The identity of the voyage is gone, and a new distinct voyage is substituted."

The identity of the voyage of the steamer carrying the sugar which was the subject of the contract was to be determined at the time of the shipment. It was not a voyage from Java to New York, or from Java to Port Said, option New York, or a voyage from Java to New York with a diversion to Philadelphia a few hours prior to its conclusion, but it was to be a voyage with a definite commencement and end, defined prior to its beginning. The parties went into great detail in specifying the termini, and it is always presumed in mercantile contracts, such as this, that they had their own reasons for so doing. Reasons, so long as they are legal, are not subject to revision by the Court. Southgate and Company were not buying one thousand (1000) bags of Java White Sugar, but one thousand (1000) bags of Java White Sugar, loaded and shipped at a certain time, in a voyage characterized by definite termini, namely, Java and Philadelphia, which termini were fixed in advance of the movement of the merchandise. And likewise by the terms of the letter of credit the Bank was only required to honor a draft drawn against Java White Sugar which had been shipped during August-September, 1920, from Java to Philadelphia.

Woodruff v. Noyes, 15 Conn. 334.

The facts of this case were these:

Justus Chollar, residing at Brooklyn, Connecticut,

called upon the plaintiffs, who were manufacturers of iron castings in Hartford to know the terms upon which he could procure a quantity of plow castings to be made at their foundry and to be furnished on a credit; he, upon his return to Brooklyn, to inform the plaintiffs further upon the subject. On the 4th of November, 1839, Chollar wrote to the plaintiffs informing them what quantity of castings he would take upon the terms discussed when he was in Hartford, on a credit of six months from the first day of the following April, in which letter he added: "Please ship to the care of F. W. Bushnell." This letter was duly received by the plaintiffs; but no answer was returned. On the 27th of November the plaintiffs shipped the castings so ordered by a vessel bound to Norwich, then at Hartford; this being the usual mode of transportation. They were directed to Justus Chollar, Brooklyn; but not to the care of F. W. Bushnell, Norwich, and bills of lading were given accordingly. The question involved was whether by reason of the failure to ship in accordance with the instructions which became a part of the agreement, the title to the castings passed to Chollar. The Court disposed of the question in this manner:

> "Considering the contract between the plaintiffs and Chollar to be, that the latter would purchase the property in question, on condition that it should be directed agreeably to the orders contained in his letter, it is clear, that, as it was not so directed, the court below correctly instructed the jury that Chollar was not bound to receive it; and that, therefore, unless he waived a performance by the plaintiffs of this condition, the title to the property would not vest in Chollar, but would re-

main unchanged in the plaintiffs. It was the duty of the plaintiffs, if they would bind Chollar to the acceptance of the property, not only to send it to him within at least a reasonable time, but also to comply with the condition on which it was to be purchased, as to the manner in which it was to be transmitted. This being prescribed in the contract, we cannot say, that it was not essential."

Jones v. Schneider, 22 Minn. 279.

The facts and principles laid down in this case are peculiarly in point in the present instance.

"In April, 1874, defendant gave plaintiffs, through their agent, a written order in these words: 'You will please ship to me from the factory to Bass Lake station, care of J. H. Lohman, on or before the 1st day of July, 1874, one of the Marsh harvesters, for which I agree to pay you or your agent, in cash and notes, on the arrival of the machine, two hundred and twenty dollars, as follows: note, $110, Nov. 1, 1874; note for $110, due Nov. 1, 1875, with interest.' At the time when the order was given, plaintiffs' agent agreed to sell and ship the harvester in accordance with the terms of the order. Plaintiffs shipped a lot of harvesters from the factory to Minneapolis, without selecting any particular one for defendant, and on June 26, 1874, shipped one of the lot from Minneapolis to Bass Lake station, where it arrived as early as some time in July, 1874."

The plaintiffs brought an action for goods sold and delivered for the purpose of recovering the purchase price of the harvester. It thereupon became necessary in order for the plaintiffs to recover to show that the article had been shipped in accordance with the terms

of the contract, these terms being that the same should be shipped by the plaintiffs from their factory to the defendant at Bass Lake Station. The harvester was not shipped from the factory, but was shipped from the factory to Minneapolis, from which point it was ultimately shipped to Bass Lake Station.

The analogy between the facts of that case and the present are at once apparent. The sugar in question was not shipped by Lamborn from Java to Philadelphia, but was shipped from Java to New York and afterwards diverted. The Court disposed of the matter in the following language:

> "Now, the authority given by the defendant to the plaintiff in the case at bar was to ship 'to me from the factory to Bass Lake Station,' etc. This authorized the plaintiffs to select and appropriate a harvester for the defendant, by shipping it to him from the factory to Bass Lake Station; and if a harvester had been so shipped, the shipment would have appropriated the harvester to defendant, and have vested the property thereof in him, and the shipment would have been a delivery. But the harvester was not shipped to defendant from the factory to Bass Lake Station, but was one of a lot shipped from the factory to Minneapolis (without the designation of any particular machine for defendant), and from Minneapolis the shipment was made to Bass Lake Station. The shipment, not being made in accordance with the terms of the contract, did not pass the property in the machine to defendant, or operate as a delivery thereof to him. Benjamin on Sales, 263-5; *Corning v. Colt,* 5 Wend. 253; *Hills v. Lynch,* 3 Robt. 42.
>
> It may be that the difference between the manner in which the shipment was ordered to be made and that in which it was made was, in fact, of little or

> no material consequence in itself, so far as we can see; but the contract of the parties must govern. *It is not for the court to speculate upon the importance of stipulations which contracting parties see fit to insert in their agreements.*" (Italics ours.)

This Court will not overlook the significant statement in the opinion quoted that, "It is not for the Court to speculate upon the importance of stipulations which contracting parties see fit to insert in their agreements."

As was aptly said by Judge Learned Hand in Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc., 16 Fed. (2) 186:

> "There is no room in commercial contracts for the doctrine of substantial performance."

This language is peculiarly applicable in the present instance. Southgate & Company procured from the respondent bank a letter of credit which was only to be payable upon the compliance by Lamborn & Company with certain stipulations. The interest of the bank in the transaction was simply to so comply with the stipulations of the letter of credit procured from it by Southgate & Company as to enable it, upon the payment of the amount provided for therein, to collect from Southgate & Company. Whether these provisions were important or not it was not for the bank to say. Its sole interest was that there should be a compliance with those conditions which were a prerequisite to its collection from Southgate & Company. It could not waive these requirements except at its peril, and it would have been guilty of the grossest bad faith had it attempted to do so and then endeavored to recover

against Southgate & Company. It had but one rule of conduct outlined for its guidance and that was to live strictly up to the terms of the letter of credit and to request Lamborn & Company in whose favor the same was issued to do likewise. Failing in this, it would have been untrue to its trust and, as a consequence, unable to have collected. Paraphrasing the language of the Minnesota Court, it was not for the bank to speculate upon the importance of the stipulations which Southgate & Company had seen fit to insert in this agreement.

The position of the bank was clearly outlined in the testimony of Mr. Wharton, its Cashier (R. 65) where he says:

> "We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying * * * We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of credit."

The foregoing cases well illustrate the established doctrine that to comply in a sale of certain specified property, specifically described, it is not sufficient that the seller deliver other property of the same grade and quality. The purchaser is bound to accept only the specified property to which the contract relates.

This principle is elaborately discussed and illustrated in a note in 35 L. R. A. (N. S.) 290, *et seq.* As illustrating this principle the note refers to the case of Hesser v. Chicago & W. Coal Co. (C. C. A. 7th Cir.) 151 Fed. 211, in which it was held that it is not a substantial compliance with a contract to sell coal from a certain

colliery, to tender coal just as good from the same district, but from a different colliery, and the seller is not entitled to have submitted to the jury the question whether the coal tendered was in fact of the same quality as that described in the contract.

Shackelford v. Sloss Iron & Steel Co., 140 Ala. 329, is likewise in point. The Court there held that a contract to sell the output of a certain quality of ore from the contractor's mine, for a stated period of time, is descriptive of the ore sold, and the contract cannot be complied with by tendering ore from any other mine.

Numerous other cases cited in this note will give additional applications of this rule.

B. Canada Supreme Court Upholds Respondent's Position.

In California Prune and Apricot Growers, Incorporated, v. Baird & Peters, decided by the Supreme Court of Canada, December 10, 1925, (1926) (Can.) S. C. 208, the Canada Supreme Court in an elaborate opinion with liberal quotations from the opinions in Bowes v. Shand, Norrington v. Wright, and Filley v. Pope, all of which will be referred to and discussed hereafter in this brief, upheld and applied the principle contended for by the respondent.

The facts of the case were briefly these:

The appellants under a written contract sold to the respondents a carload of prunes to be delivered f. o. b. Pacific Coast Shipping point. The contract provided that ultimate destination of the shipment should be St. John, N. B. and that routing instructions to this ultimate destination should be given by the purchaser to the seller. Thereafter routing instructions were given in writing to the agent of the seller and provided that

the car should be routed over the Canadian National Railways from Chicago to St. John, its destination. The car was, however, in fact routed over the Canadian Pacific Railway to St. John, and upon its arrival there, the buyers refused to accept the goods, holding that the failure to comply with their routing instructions entitled them to repudiate. The question presented to the Court was whether the breach complained of, namely, the failure of the seller to route the goods in accordance with the contract, gave the buyer the right to reject and treat the contract as repudiated. The Court quotes Williston on Sales (2nd. Ed.) P. 585, as follows:

> "the property will not pass if the goods are too many, or too few or they are sent at a materially different time, or by a different route or method of shipment, or are misdirected."

and concludes:

> "In that view, the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not 'an unimportant variation,' which may, under the present contract be excluded as constituting a 'basis for a claim;' but, on the contrary 'may fairly be considered by the other party as a substantial failure to perform the contract at all.'"

The Supreme Court, for the reasons given, thereupon upheld the action of the two lower courts of New Brunswick, which had decided that the sellers were not entitled to recover from the buyers, for the reason that they had failed to route the goods as provided in the contract.

It will be observed in this case that the ultimate des-

tination of the goods from the time they were shipped from the Pacific Coast was St. Johns, New Brunswick, but the fact that they moved over a railroad contrary to the directions of the buyers absolved them from liability.

In the present case the sugar in question was never destined to Philadelphia until about 24 hours before it arrived, and for the greater part of the voyage was destined to another point, namely, New York. The claim of Lamborn and Company therefore is far weaker than that of the sellers in the Canadian case.

C. The Doctrine of The United States Supreme Court.

By way of introduction to what we believe to be controlling decisions of the Supreme Court of the United States we have heretofore called attention to some of the most apposite decisions of other Courts, which we believe should commend themselves to this Court, not by way of their controlling authority, but by reason of their common sense and well reasoned conclusions.

We now invite the attention of this Court to certain of its own expressions which recognize and apply the same principle and which we believe to be decisive of the present question.

Filley v. Pope, 115 U. S. 213.

The facts were quite similar to those in the instant case.

The defendant bargained for and bought of the plaintiffs and they sold to him five hundred tons of Scotch pig iron, at the price of $26.00 per ton to be paid in cash by the defendant upon the delivery to him of the

iron at New Orleans; the iron to be shipped from Glasgow, Scotland. The execution of the contract was not in dispute but the evidence established the fact that the iron which was at the works of the producers in Scotland at a point equidistant from the ports of Glasgow on the west coast and of Leith on the east coast, instead of being shipped from Glasgow as provided in the contract, was shipped from Leith, owing to the fact that shipment from the latter point was more expeditious, and, as a result thereof, a more satisfactory delivery at New Orleans could be made.

At the trial the Court instructed the jury that the provision of the contract that the iron was to be shipped from Glasgow was not material; that the purpose of the contract was the sale by the plaintiffs to the defendant of a certain quantity of iron to be delivered at a certain time at a certain place, and the fact that it was shipped from Leith instead of Glasgow was not material to the rights of the parties in the case, if the other provisions of the contract were complied with, and if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow.

There was verdict and judgment for the plaintiffs and on appeal the correctness of this construction was the question before the Court.

The Supreme Court in a unanimous decision held that in a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such

as the time or place of shipment, is to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. The Court disposed of the contention in the following language, which we believe equally applicable to the case at bar:

> "The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped from 'Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular Port of Glasgow as soon as possible. The court has neither the means nor the right to determine why the parties in their contract specified 'shipment from Glasgow' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.
>
> "One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in the iron

> during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. (Citing cases.) But a policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith."

Applying the same principle to the present case, it is not merely one thousand bags of Java white sugar that Southgate and Company were purchasing and in payment of which they obtained a letter of credit embodying the terms set out, nor is it such sugar to be procured or shipped in any manner that Lamborn should elect, but it is sugar of that quality to be shipped at a certain time from the Island of Java by steamer or steamers to Philadelphia. Neither the Court nor the Bank has the means nor the right to determine why Lamborn and Southgate in their contract specified "Shipment from Java to Philadelphia," but they are bound to give effect to the terms which the parties have chosen for themselves. The term "shipment from Java to Philadelphia" defines an act to be done by the sellers at the outset and is a condition precedent to any liability of the buyer. Southgate and Company do not agree to accept sugar shipped from the ports of any other country than Java, nor at any other than the designated time, nor to any other port than Philadelphia, and until the sellers have tendered sugar that has been so shipped they have failed to show a compliance with the terms of their undertaking.

Southgate and Company had an interest in the sugar during the voyage, by reason of the title which would accrue to them under the contract on arrival and delivery, and of the profits that they might make in case

of a rise in the market, and, as pointed out by the Court, a policy of insurance upon the sugar for a voyage from Java to Philadelphia would not cover sugar en route from Java to New York, yet this is admittedly the condition of the sugar in question, according to the petitioners, from September 30th until December 13th, a period of seventy-five days, when, at the expiration of which time and when the vessel was but two days' distant from the American coast, she was diverted from her original destination of New York into the port of Philadelphia, in order to meet the exigencies of Lamborn and Company's then situation.

The learned trial judge on the first trial failed to grasp the underlying principle enunciated by the Supreme Court in Filley v. Pope. A few quotations from the opinion rendered by him from the bench in overruling the defendant's motion for a directed verdict on the plaintiff's evidence will substantiate this statement. He says (R. 50, 51):

> "The second point that the shipment had to be from Java to Philadelphia from its inception without any diversion after the ship had left the original port of loading seems to me to find such support as there may be said to be to that position in the right of the purchaser of the sugar to insure his interest and his profits, and if that be true, that condition would not apply in the case of a guarantor like a bank furnishing a letter of credit, and in determining the question of compliance with the terms of the letter of credit, it seems to me the only guide can be the terms of the letter of credit itself. That provides that shipment be made during August and September, 1920, at option of seller by steamer or steamers from Java to Philadelphia. There isn't any suggestion that the shipment was not from Java and it is equally

true and a concession in the case that the ultimate destination of the steamer was Philadelphia. It happens that that destination was accomplished, as Mr. Taylor points out, as the result of a subsequent arrangement with the owner of the steamer just three days out of port by which in consideration of a bonus freight rate, she was diverted from New York, her original destination, to Philadelphia. If we were dealing with a contract between Southgate & Company and Lanborn & Company in which the contract required that they should designate the ship on which the cargo was to be loaded and which was to be used for the transportation of the cargo, that, of course, would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Scotland case, the steel case, would at once arise when the declaration was made, and I can very readily understand that an insurable interest in a contract requiring a shipment of sugar to Philadelphia might not obtain in a case of a shipment to New York, but, as I intimated a moment ago, that contract is not in evidence in this case. I don't know what its terms may be, and the suit is on a letter of credit issued by the bank."

This language evinces a misconception of the relation of the Bank to the letter of credit. The Bank in furnishing this letter of credit at the instance of Southgate in favor of Lamborn was not a guarantor, but by the very terms of the instrument it became primarily liable to Lamborn, upon the express understanding, however, that "*the conditions embodied in this credit must be adhered to, otherwise payment will not be effected,*" and the provision upon which the defendant relied and, as we conceive, justly, was a provision in the letter of credit itself, incorporated therein at the

instance of Southgate, against whom recovery could be ultimately had upon the payment by the Bank to Lamborn only according to the terms of said letter and upon compliance by the Bank with all of the provisions therein. The statement of the trial court is that were it dealing with a contract between Southgate and Lamborn in which there was a requirement that Lamborn should designate the ship on which the cargo was to be loaded and transported, that that would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Filley case would at once arise when the declaration was made. This statement is made in entire disregard of the provisions of the contract in the Filley case. They were in writing and are fully set out in the opinion as follows:

> "St. Louis, February 20, 1880. Thomas J. Pope & Bro., New York: Have sold for your account to Mr. O. B. Filley, St. Louis, 500 tons No. 1 Shott's (Scotch) pig iron, at $26 per ton cash in bond at New Orleans. Shipment from Glasgow as soon as possible. Delivery and sale subject to ocean risks.
>
> Very truly,
> WILLARD & COMBS."
>
> "Accepted,
> O. B. FILLEY."

It will thus be seen that the elements of difference that the trial court assumed to exist between the Filley case and the instant case are entirely lacking. The defendant did not rely upon the provisions of the contract between Lamborn and Southgate, but did rely upon the letter of credit issued by it at the instance of Southgate in favor of Lamborn, which fully set out the

conditions under which it was to be liable to Lamborn, which conditions Southgate and Company had an absolute right to insist upon, and from which the respondent would have departed only at its own risk.

The trial court again says (R. 51.:

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia."

Why not?

This position can be completely answered in the language of the Supreme Court by saying that the buyer takes the risk of delivery or sea perils which may occur in the course of a voyage from Java to Philadelphia, but does not take the risk of delivery or disaster which may occur in the course of a voyage from Java to Port Said, and, upon the exercise of the option of the sellers, from Port Said to New York, and, by diversion from the latter voyage shortly before docking, to Philadelphia. And in further answer to the same suggestion that the requirement does not contemplate a continuous intention and a continuous shipment from Java to Philadelphia, in the language of the Supreme Court it can be said that the requirement of shipment from Java to Philadelphia "defines an act to be done by the sellers at the *outset* and a *condition precedent* to any liability of the buyer." (Italics ours.)

The uncertainty and confusion resulting from the conclusion that the contract did not require a continuous intention from the inception of the voyage to send the vessel to Philadelphia is well illustrated in this case. From the time the "WEST CHESWALD" left

Java, about October 1st, until the 13th day of December, 1920, there was apparently, so far as the record discloses, no intention on the part of any one that the "WEST CHESWALD" should dock and unload at any other port but New York. The testimony of all of the witnesses, including those for the petitioners, is characterized by the utmost frankness.

The testimony of Francis C. Gawel, a clerk of the Tracy Steamship Company (R. 19-21), clearly sets out the situation existing prior to, and at the time of, diversion. He says:

> "I had a telephone conversation with Mr. B. W. Dyer, a member of the firm of Lamborn & Company, concerning the Steamship "WEST CHESWALD," Mr. Dyer asking me whether we would consider sending the "WEST CHESWALD" to Philadelphia instead of New York. I told him, as far as I can remember, that it would all depend on how Lamborn & Company's sugar was stowed, and to obtain this information I radioed the Master at his request."

Then follows his testimony giving in detail his efforts to obtain the information desired. The witness then proceeds:

> "Our next step after receiving the Captain's radiogram was an immediate communication with United States Shipping Board by telephone. I told the Shipping Board the contents of the Captain's radiogram, and asked if they would consider sending the "WEST CHESWALD" to Philadelphia instead of New York. They authorized me to divert this steamer to Philadelphia at an additional freight charge of $1.00, which charge was to be made against Lamborn & Company. By telephone I communicated with Lamborn & Com-

pany, talking to a man who gave his name as Mr. Dyer. He said that he would consult with his company and let me know. Afterwards he telephoned me and said to go ahead and divert the steamer to Philadelphia, that his company was agreeable to paying the extra $1.00 per ton freight."

It will thus be seen that up until December 13th, 1920, Lamborn & Company had absolutely no control over the "WEST CHESWALD," or her freight, so far as changing her destination was concerned, and on that day, when, for the first time, they deemed it to their interest to divert the vessel, there were a number of conditions that had to be met, over none of which they, Lamborn & Company, had control, before the vessel could be diverted to Philadelphia.

Let us consider the following circumstances as showing Lamborn's lack of control over the vessel (R. 19-21):

1. Dyer telephones Gawel as to whether his Company would consider diverting the "WEST CHESWALD" to Philadelphia instead of New York.

2. Gawel tells Dyer that this would depend on how Lamborn's sugar was stowed.

3. It was necessary to obtain this information by radiogram from the Captain.

4. The consent of the Shipping Board was necessary to divert the vessel to Philadelphia.

5. The payment of an additional freight charge of $1.00 per ton was required.

And then and only then was the option given to Lamborn, who, after consultation among the members of the firm, agreed to divert the vessel.

To say that a shipment which was never originally intended for Philadelphia but which finally arrived

there under such conditions and surrounded by such uncertainties, is a shipment from Java to Philadelphia, is stretching to the breaking point the language of the contract requiring a shipment "during the months of August-September from Java to Philadelphia."

Norrington v. Wright, 115 U. S. 188.

The same principle was recognized in this case as in that of Filley v. Pope, and the Court unanimously held that in a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is to be regarded as a warranty or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

The opinion in this case is peculiarly interesting by reason of its copious citations with approval of the various opinions delivered in the House of Lords in Bowes v. Shand, 2 App. Cas. 455.

The following extract is particularly in point:

> "In that case, two contracts were made in London, each for the sale of 300 tons of 'Madras rice to be shipped at Madras or coast, for this port, during the months of March and/or April, 1874, per Rajah of Cochin.' The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,303 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the

House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

"In the opinions there delivered, the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

"Lord Chancellor Cairns said: 'It does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.' 2 App. Cas. 463. 'If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning; it is no observation which can dispose of or get rid of or displace that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.' Pp. 465, 466. 'It was suggested that even if the construction of the contract be as I

have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months.' 'The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract.' Pp. 467, 468.

"Lord Blackburn said: 'If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particu-

lar time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it.' 2 App. Cas. 480, 481."

Lowber v. Bangs, 2 Wall. 728.

The question involved in this case was a stipulation in a charter party providing "the ship to proceed from Melbourne to Calcutta with all possible dispatch." The Court held that this meant that the ship was to proceed direct from one place to the other and that time was of the essence of the contract.

The following extract from the opinion of the Court is peculiarly applicable to the present case:

"Promptitude in the fulfillment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business. The result of a voyage may depend upon the day the vessel arrives at her port of destination, and the time of her arrival may be controlled by the day of her departure from the port whence she sailed. We cannot forget these considerations in our search for the meaning of this contract. That the parties could have intended that when the vessel left Melbourne she might wander in any direction over the Indian seas, and that whenever and wherever she should receive intelligence of the contract, she might proceed to Calcutta and claim its fulfillment by the char-

terers, strikes us as incredible. So to hold, we think, would be to make a new contract for the parties, and not to execute the one they have made. We cannot give any other construction to the language, 'The ship to proceed from Melbourne to Calcutta with all possible dispatch,' than that she was to proceed direct from one place to the other, and that to this extent, at least, time was intended to be made of the essence of the contract. We lay out of view the state of things at Calcutta when the vessel arrived there. To allow that to control our conclusion, would be to make the construction of the contract depend, not upon the intention of the parties when it was entered into, but upon the accidents of the future."

This quotation, we believe, shows that there must be an original intention consistently adhered to throughout that the shipment from its inception to its termination be made in accordance with the *termini* set out in the contract, and should not be dependent upon future accident, chance, or caprice in the ultimate delivery of the subject-matter of the contract at the *terminus ad quem*.

D. ADDITIONAL ENGLISH CASES.

In Section 280 of Williston on Sales (2nd Ed.), there is a discussion of the obligation of the seller, when goods are to be shipped to the purchaser. The author says:

"There must always be a bill of lading showing the shipment of the goods by proper route, and there must always be a proper insurance policy. The bill of lading must be procured on shipment. * * *"

There are two English cases, among others, cited in support of this proposition which we believe supplement and sustain the authorities heretofore cited.

"In Hansson v. Hamel and Horley, Ltd., (1922) A. C. 36, a Swedish merchant agreed to sell to an English company a quantity of guano in bags c.i.f. Norway to Kobe or Yokohama, terms net cash against documents in London; time of shipping as to the first installment March/April, 1920. The seller, in anticipation of his obligations under the contract, agreed with L., the agent at Hamburg of a Japanese company, which ran a line of steamers from Hamburg to Japan but ran no steamers from Norway, for the conveyance of the guano from Hamburg to Japan on the terms that L. should sign through bills of lading as soon as the goods were in his possession. Between April 20 and 22 the guano was shipped by the sellers in several lots from various Norwegian ports, including B., on the steamship K to Hamburg. On the arrival of the goods at Hamburg, L. signed several documents in identical terms, called through bills of lading, bearing date May 5. The bill of lading relating to the B. consignment stated that the goods were shipped in apparent good order and condition on board the K. lying at B. and bound for Hamburg, for transshipment into the Japanese Company's steamer A., to be delivered in the like good order and condition at the port of Yokohama unto 'order,' and the margin contained the statement: 'Shipped from B. according to bill of lading on the 22nd April, 1920.' On May 12, the seller tendered to the buyers documents relating to the first installment, including the ocean bills of lading, but the buyers rejected the documents and refused to take up the goods. In an action for the price of the goods, it was held first, that the ocean bills of lading were not through bills of lading, *inasmuch as they afforded no protec-*

tion to the buyers on the initial voyage, and did not satisfy the conditions of the contract; secondly, that on a sale on c.i.f. terms *the contract of affreightment must be procured on shipment,* and that a bill of lading issued thirteen days after the original shipment at another port in another country was not procured on shipment.

In Landauer & Company v. Craven & Speeding Brothers, (K. B. Div.) 2 Law Reports 94 (1912), the headnote is as follows:

"Sellers agreed to sell 400 bales of hemp at a price to include cost, freight and insurance. By the terms of the contract of sale the hemp was to be shipped from a port in the Philippine Islands or from Hongkong by steamer or steamers direct or indirect to London between October 1 and December 31, 1909; payment was to be by cash in exchange for shipping documents, and disputes under the contract were to be settled by arbitration.

The sellers then purchased from B. & Co. 400 bales of hemp. This hemp had been shipped at Manila, a port in the Philippine Islands, under bills of lading dated at that place December 28, 1909, for delivery at Hongkong to the order of the shippers; it was intended for transshipment and was transshipped on a steamer bound for London, the bills of lading being dated at Hongkong, March 25, 1910; it had been insured by the shippers from Manila to London.

The sellers tendered to the buyers in fulfillment of the contract of sale the bills of lading from Hongkong and the policy of insurance from Manila to London. The buyers paid the contract price under protest contending that these documents were not a good tender under the contract. The dispute was referred to arbitration.

The arbitrator found that it was a usual course,

when goods were shipped from Manila to London, to transship them at Hongkong, but to ship them in the first instance at Manila on a through bill of lading from Manila to London; in so far as it was a question of fact, he found that, on a contract of sale of goods on cost, freight and insurance terms, it was by mercantile usage, unless otherwise agreed, the duty of the seller to provide by contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination:

HELD, that the tender of the documents was not a good tender under the contract, first, because it did not include a contract of affreightment to London made before December 31, 1909, and, secondly, because it did not include a contract of affreightment from Manila to Hongkong."

The inevitable conclusion from these two cases is that a requirement that shipment should be from Java to Philadelphia imports and requires a contract of affreightment to be procured at the time of shipment from the *terminus a quo* to the *terminus ad quem;* in other words, an initial shipment from Java to Philadelphia.

This was one of the conditions of the contract expressly set out and carefully referred to in both the opening and concluding paragraphs of the letter of credit. In the language of 2 Williston on Sales (2nd Ed.), page 1226, "Whatever conditions are expressly stated in the letter must be strictly observed in order that the beneficiary may enforce a claim against the

Bank." The same author in the same paragraph makes the following observation which is very pertinent in this case:

> "And if the Bank issuing the credit pays without performance of the conditions, it may find itself unable to charge against its customer, the buyer, the money which it has paid."

In anticipation of a discussion of the position of the petitioners, it might be well at this point to observe that so far as the instant case is concerned, there is no difference between a c.i.f. and f.o.b. shipment. It is true that some of the cases relied upon by the respondent involved shipments of the former class, but this is not universally true; in fact in Filley v. Pope the shipment was an f.o.b. shipment, the pig iron having been produced, and at the time of the contract being in Scotland, and the delivery to take place in New Orleans. Yet in this case this Court unanimously held that all contractual requirements preceding the delivery were required to be performed, including the requirement that shipment should be from Glasgow and not from Leith. If there were any justification for a distinction in the present instance between a c.i.f. and a f.o.b. shipment, this decision might have been otherwise and thus sustained petitioner's contention, but such was not the case. The main distinction between the character of the two methods of shipment pertains to the time of the passing of title. In neither case is a defaulting seller permitted to invoke the distinction as a ground for absolution when he has failed to perform some contractual obligation.

Referring to the case of Bowes v. Shand for further

illustration, what possible difference would follow in the decision if the shipment in question were an f.o.b. shipment rather than a c.i.f. shipment, or a c.i.f. shipment rather than an f.o.b. shipment? The requirement was that the rice in question was to be shipped at Madras during the months of March and/or April; a part being shipped in February, it was held that this was not in compliance with the terms of the contract.

A seller who has undertaken to perform certain conditions with reference to the subject-matter of his contract must show when he seeks to enforce the same that he has complied with his obligations. This is true regardless of when title passes.

If the rice in question had been required to be harvested during a certain month, it is immaterial whether the delivery was in Madras or in London. The pig iron was required to be shipped by a certain route specified in the contract, it was therefore essential that that route be followed even though the title to the merchandise did not pass until final destination was reached. And so it follows that if shipment is to be made during a specified time from Java to Philadelphia, that requirement must be complied with before the seller can invoke a liability against the buyer. In Filley v. Pope, the pig iron reached its ultimate destination *via* Leith as soon or perhaps sooner than it would have had it been shipped according to the contractual requirement *via* Glasgow, but this court held that the contract had not been properly complied with. As a consequence, it may be easily conceived that the sugar reached Philadelphia as soon or sooner, by the route it traveled, than it would had there been a direct shipment from Java to Philadelphia, but under the principle of Filley

v. Pope this is no answer to the respondent's position.

Judge Rose, in disposing of the contention made by counsel for the petitioners that in Landauer v. Craven and Speed Bros. (*supra*) the shipment was a c. i. f. shipment, and not a f. o. b. shipment, as a reason why the principle there enunciated was not applicable in the present instance, states (2 Fed. (2) 29):

> "Now it is true, as it is pointed out by the learned counsel for the seller, that the contract here is not a c. i. f. contract, but it is one under which the buyer had an insurable interest, and is therefore one which, so far as this question is concerned, is governed by the same principle. Moreover, at all events, Landauer v. Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson v. Hamel & Horley, L. R. 1922, 2 App. Cases 36."

E. CASES RELIED ON BY PETITIONERS.

The cases principally relied upon by the petitioners are those in lower courts in which the facts were more or less similar to those in the present case, in which the petitioners' contention is apparently sustained. None of these cases are in any sense a controlling authority, and they should not commend themselves to the favorable consideration of this Court for various reasons.

It will be at once apparent that there is neither citation of authority nor logical reasoning which justifies the conclusion reached, and it will also be apparent that the principles which are therein casually assumed and which are in conflict with the contention of the respondent, are directly in opposition to the principles

laid down by this Court in the cases hereinabove cited, and which, if applicable, should be controlling.

A consideration in detail of the cases in question we believe will justify the above statement.

Wilbur v. Lamborn, 276 Pa. 479.

The facts in that case were identical with those in the present, and the decision of the Court is contrary to our contention. It is, however, based upon premises that are likewise contrary to the holding of this Court in Filley v. Pope, *supra;* Norrington v. Wright, *supra,* as well as other cases hereinbefore cited. A comparison of the language in the Wilbur case with that of this Court in analogous cases will fully sustain our contention.

In the Wilbur case the Supreme Court of Pennsylvania cites with approval the following language of the trial judge:

> "The subject-matter of this contract is the sale of sugar. That is the material thing in it, and that part of the contract which provides for delivery in a certain way, being transported by a vessel, is an incident of that sale and delivery; and, unless somebody was harmed by reason of the manner in which delivery was made, that part ought to give way to the common intent of the contract which is the sale of sugar and its delivery."

And the same Court proceeds:

> "Some point is made by appellant of the fact that the West Cheswald was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the

contract. Plaintiff was concerned only with the delivery of the merchandise,—that there should be no delay in its arrival."

Compare the foregoing utterance with the language of Mr. Justice Gray in Filley v. Pope:

"The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped 'from Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular Port of Glasgow as soon as possible. The court has neither the means nor the right to determine why the parties in their contract specified 'Shipment from Glasgow,' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again: the buyer would have an insurable interest in the iron dur-

ing the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. * * * But a policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith."

And also compare the same with the language of the Lord Chancellor in Bowes v. Shand, set out at length and approved in Norrington v. Wright:

> "What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract."

And also the language of Lord Blackburn in the same case:

> "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves,

> to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it. 2 App. Cas. 480, 481."

In the light of the unmistakable language of this Court and of the opinions rendered in the House of Lords in Bowes v. Shand, adopted by this Court, can any reliance be placed upon the decision in the Wilbur case in disposing of the question now before this Court?

> Matthew Smith Tea, Coffee & Grocery Company v. Lamborn & Company, 276 Fed. 325.

This case was apparently decided upon substantially the same facts as obtained in the present case, but as will be seen from an inspection of the opinion there was no discussion of the point here involved. Judge Hand's opinion seems to have been an oral one, which did not go to the full merits of the case, but simply upon an interlocutory motion. He seems to assume that the shipment on the WEST CHESWALD met the requirements of the contract, and, consequently, the opinion is not helpful in disposing of the phase of the matter which was assumed by the trial judge as well as counsel.

Judge Hand, in stating the facts, uses the following language:

> "* * * the shipment on the West Cheswald met the requirements and specifications of the contract."

This is exactly what we believe the cases decided by this Court indicate that it did not do. Consequently a casual assumption of a fact will not be controlling when the overwhelming authority shows such assumption to be erroneous. We, therefore, earnestly contend that this opinion should have no controlling influence in the present case.

An appeal was taken from the decision of Judge Hand, to the Circuit Court of Appeals for the Second Circuit, and was there heard in conjunction with two other similar cases, these three cases being the same mentioned on page 2 of the petition for writ of certiorari, filed herein, as follows:

> Matthew Smith Tea, Coffee & Grocery Company v. Lamborn & Company.
> Pennsylvania Milk Products Company v. Lamborn & Company.
> L. Brenner Sons and Perloff v. Lamborn & Company, being reported in 10 Fed. (2) 697.

The opinion by Judge Hough on appeal adds but little to the discussion of the subject. While the language under consideration was contained in a sales contract and not in a letter of credit, the opinion seeks to distinguish between the case under discussion and Judge Rose's opinion in the instant case, concluding that it is not required to express assent or disagreement with the opinion of Judge Rose. On the main question involved, it has only this to say:

> "On the other question, the single issue arising on the pleading, we are of opinion that Lamborn had good right to tender sugar *Ex.* West Cheswald, and have little to add to the opinion of Hand, J. in 276 F. 325."

In this regard the opinion is similar to that in Wilbur v. Lamborn and that of Judge Hand in the trial Court, in that it assumes rather than demonstrates the conclusion arrived at. This point is perceived and commented upon in the exhaustive opinion of Judge Rose rendered in the Circuit Court of Appeals, 2 Fed. (2) 23, when he says:

> "In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority."

The petitioners are particularly unfortunate in citing Harrison v. Fortlage, 161 U. S. 57, in an effort to sustain their contention:

The subject of the contract in that case was

> "About 2500 tons superior Iloilo sugars, usual assortment (1/8 No. 1, ¼ No. 2 and 5/8 No. 3) shipping or to be shipped during this month from the Philippines to Philadelphia, per Steamer 'Empress of India.' "

The contract was strictly complied with so far as the terms relating to shipment were concerned. As said by Justice Gray:

> "The sugar was shipped at the Philippine Islands in bags, in the amount, quality, and assortment, and within the time, specified in the contract, on the 'Steamer Empress of India,' which was then seaworthy and fit in every particular for her voyage *and which sailed for Philadelphia.*" (Italics ours.)

It will be observed that the shipping requirements of the contract under consideration and those set out

in the letter of credit in the instant case were practically identical. In Harrison v. Fortlage the shipping requirements were complied with to the letter. In other words, the sugar was shipped within the time specified in the contract, on the steamer specified therein, and which *sailed at the time of her departure from the Philippines to Philadelphia;* in every particular a strict compliance with the terms of the contract. In the present case the sugar in question left Java on a vessel which, so far as the documents show, was never intended for Philadelphia, and which was only conditionally intended for the United States at all, her original destination being Port Said, with an option, which might or might not have been exercised, to extend the voyage to New York, but not to Philadelphia.

As was again said in the opinion:

> "The sugar in question having been put on board the 'Empress of India' and *the conditions of the contract thus satisfied,* so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the general rules of the maritime law." (Italics ours.)

Can it by any possibility be claimed that, had the shipment in Harrison v. Fortlage been on a vessel destined for Port Said, with an option to New York, it would have been a compliance with the terms of the contract, providing for a shipment from the Philippines to Philadelphia? The answer must necessarily be in the negative.

It seems to be the theory of petitioners, which theory

seems to have been adopted by the trial judge on the first trial, that arrival at Philadelphia is the sole desideratum. Judge Groner, in his opinion in construing the requirements of the contract as to shipment, says: (R. 51)

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intent and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me that it would be a compliance with the contract."

If this is the case why the elaborate provisions of the letter of credit:

> "Shipment to be made during August, September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia?" (R. 8)

That the letter of credit did contemplate and require that there must be all the time from the inception of the voyage the intent and purpose to send the vessel to Philadelphia is shown by the requirement that among the documents to be furnished was "copy of ocean bill of lading covering shipment Java to Philadelphia," (R. 8). This bill of lading is necessarily issued in Java prior to the inception of the voyage. The bill of lading issued by the *West Cheswald* prior to her leaving Java could not have complied with this requirement, because by its terms it described the destination of the shipment as "Port Said, option New York." (R. 116) This requirement could only have been complied with by a bill of lading showing

shipment from Java to Philadelphia, and thereby describing and providing for a shipment with these termini then and there in contemplation.

It is true, as mentioned before, that the requirement as to furnishing a copy of the bill of lading at the time of the presentation of the draft was dispensed with, yet neither the character of shipment nor the essential ocean bill of lading to be issued at the time of shipment was ever dispensed with, and, as a consequence, the requirement that the shipment be one from Java to Philadelphia was necessarily maintained at all times.

The petitioners themselves recognize the casual character of the *West Cheswald's* voyage. They say on page 39 of their brief, in speaking of this vessel:

> "She was destined for no particular port but could go to any one."

How could the cargo of such a vessel, destined for no particular port, be considered a shipment with a definite ultimate destination?

Justice Gray's opinion in Harrison v. Fortlage has construed the meaning of similar language in a manner consistent with the contention of the respondent. The position of petitioners and the theory of the trial judge's opinion is directly to the contrary. Is it not an effort to do what Mr. Justice Gray says in his opinion cannot be done, namely:

> "The Court is not at liberty either to disregard words used by the parties descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

There are cited for this proposition many of the cases which are relied on by the respondent in this brief.

It will be seen that the cases relied on by petitioners and which are more nearly in point are *nisi prius* decisions, with the exception of the Pennsylvania case of Wilbur & Sons, Incorporated, v. Lamborn, 276 Pa. 479, and Matthew Smith Tea, Coffee & Grocery Co. v. Lamborn (3 cases) 10 F. (2d) 697, which are heretofore discussed. We believe it has been shown that those cases, as well as the others relied on by petitioners, are decided directly contrary to the principles laid down on Norrington v. Wright, 115 U. S. 188, and Filley v. Pope, 115 U. S. 213. These two cases have been often considered and applied and especially have they received spontaneous recognition and approval by the Circuit Court of Appeals of the Fourth Circuit in analogous cases.

In Lamborn & Company v. Palmetto Grocery Company, 284 Fed. 431, in a unanimous opinion rendered by Judge Groner, (Circuit Judges Knapp and Waddill also sitting) citing Norrington v. Wright, it is said:

> "It has been repeatedly held that a statement in a mercantile contract descriptive of some material incident is a condition precedent to the enforcement of the contract, and that courts have neither the means nor the right to determine why parties, in their contract, specified the method of handling the subject matter as they did, nor to substitute some other method, equally as good, for that agreed upon."

In Markey v. Brunson, 286 Fed. 896, in a unanimous opinion by Circuit Judge Woods, (Circuit Judges

Waddill and Rose also sitting) citing Norrington v. Wright, it is said:

> "The instructions were correct that compliance by the seller of his undertaking as to the time of shipment was necessary to charge defendant, and that defendant was under no obligation to receive goods shipped after the expiration of the time. 'In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.' "

In The Manhattan, 284 Fed. 313, in the opinion by Judge Waddill, citing Filley v. Pope, it is said:

> "Secondly, that the purchaser had no right to insist upon shipment being made exclusively on the Manhattan. This contention is equally without merit. The contract was for shipment on that vessel at a specified time, refusal of substitution of another vessel by the respondent being denied positively, and upon the consummation of the contract to ship on the Manhattan the purchaser was entirely within its rights in so insisting. This principle is well recognized in maritime contracts. The reasons therefor are manifest, and the right free from debt."

It will thus be seen that the principle for which respondent contends is not a new or novel one, but has

been long recognized as the rule laid down by this Court and followed consistently and repeatedly by it, as well as by the lower Federal Courts, including every member of the Circuit Court of Appeals for the Fourth Circuit, as well as by Judge Groner, the trial judge.

An effort has been made by the petitioners to invoke either the rule as laid down by the Supreme Court of Pennsylvania in Wilbur & Sons, Inc. v. Lamborn, 276 Penn. 479, on the ground that delivery of the sugar in question was to be made in Philadelphia, Pennsylvania, and consequently that the law of Pennsylvania should control, or failing in this, that as the letter of credit was payable in New York, the decision of the Circuit Court of Appeals for the Second Circuit, rendered in Matthew Smith Tea, Coffee and Grocery Company v. Lamborn, 10 Fed. (2) 697, announcing the law of New York should control. Both of these positions are without merit. Under certain circumstances it is conceivable that the law of the place of performance might assume a very important aspect, but not in the present instance. The decision in 10 Fed. (2) 697, is one pertaining to general law and has no reference to any local statutes or customs. Nor does it possess any other elements of a controlling character. It is anticipated that the decision of the Circuit Court of Appeals for the Second Circuit will be given such consideration and only such consideration as it is inherently entitled to. It will be observed that there are no cases cited by petitioners from the court of last resort in the State of New York. It is true that they have referred to certain decisions of the Supreme Court of that state, but it is needless to say that this Court even in its Appellate Division is only an inter-

mediate court. The only cases decided by the Court of Appeals of New York, the highest Appellate Court of that State, and relied on by either party to this litigation are those heretofore found in this brief, namely:

Bank of Montreal v. Recknagel, 109 N. Y. 482.
Ledon v. Havemeyer, 121 N. Y. 179.
Iasige v. Rosenstein, 141 N. Y. 414.
Firemen Insurance Company v. Lawrence, 14 Johnson (N. Y.) 56.

All of these cases we believe to be in point and are confidently relied upon in sustaining our contention consistent with our previous observation. It is felt, however, that even these decisions are not controlling upon this Court but at most are only persuasive.

The matter here involved is one of general commercial law possessing no local attributes. The parties in interest are citizens of different states. The occasion for the letter of credit was a commercial contract pertaining to a subject matter then located in the Orient. The instrument upon which suit was brought was a letter of credit possessing all of the attributes of a negotiable instrument. It therefore necessarily follows that State decisions have no controlling effect in a case of this kind and that this Court will follow its own independent opinion.

It hardly needs the citation of authority for the proposition that the Judiciary Act, which by repated reenactments is still the existing law, in declaring local laws rules of decision in Federal Courts, is limited in its application to laws strictly local, and construction thereof adopted by local tribunals and to rights and titles to things having permanent locality; it does not extend to contracts and other instruments of a

commercial nature. Swift v. Tyson, 16 Peters, 1. This principle has received such general recognition and has been so consistently followed that a citation of all of the many cases on the subject decided by this Court would be superfluous. Among the analogous instances in which this Court has exercised its independent judgment have been the following:

In the matter of negotiable instruments:

> Brooklyn City and Newtown R. R. Co. v. National Bank, 102 U. S. 14.

In the matter of the construction of insurance contracts:

> Carpenter v. Providence Washington Insurance Company, 16 Peters, 495.

In the matter of the liability of common carriers:

> Chicago, etc. Ry. Co. v. Ross, 112 U. S. 377.

In the matter of the validity of stipulations in Bills of Lading:

> New York Central R. R. Co. v. Lockwood, 17 Wall. 357.

It would therefore seem to conclusively follow that this Court treating the question involved as one of general commercial law will proceed to consider and dispose of the same, forming its independent judgment, untrammeled by the decision of any State court, giving, however, to all pertinent decisions such persuasive consideration as they may be justly entitled to.

F. Judge Rose's Opinion.

Most of the cases herein cited, as well as those contained in the petition and brief of the petitioners for a writ of certiorari were used in the various arguments in the lower courts, and it would seem in order at this point to briefly refer to the opinion rendered by Judge Rose on the first appeal, this being reported in 2 Fed. (2) 23. Judge Rose's opinion differs from those rendered in Wilbur v. Lamborn, 276 Pa. 479 and in Matthew Smith Tea, Coffee and Grocery Co. v. Lamborn, 10 Fed. (2) 697, not only in the conclusion arrived at, but also in the elaborate discussion of the authorities justifying that conclusion.

As Judge Rose aptly observes in the course of his opinion:

> "In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority."

Judge Rose's opinion, whatever else may be said of it, is not subject to this comment. He takes up in detail all of the cases relied upon by the petitioners to sustain their contention and reasoning from the decisions of this Court as well as from those of the House of Lords and the inferior English Courts demonstrates conclusively the correctness of his position and the inherent incorrectness of the contrary opinions. He concludes his opinion with the following language:

> "We in the past have had more than one occasion to hold that in mercantile contracts the Courts must give effect to every term in the bargain the parties have chosen to make and are not

at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in The Manhattan 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came in another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was brought in the substitute. From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the *West Cheswald,* it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchasers from escaping from a bad bargain by taking advantage of a variation from the terms for which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice Gray in this country and from Lords Cairns and Blackburn in England. Our examinations of the cases which in this country and across the water have put a definite interpretation on the meaning of the word 'shipment' as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from it and is governed by what the Supreme Court there said."

V. THE DOCUMENTS FAIL TO SHOW TENDER OF JAVA WHITE SUGAR.

The letter of credit covers one thousand (1,000) bags Java White Sugars at twenty-two cents per pound.

It is naturally to be presumed that from the inclusion of the term "white" there were other Java sugars of a different quality and value.

There were three documents required to be tendered at the time the payment of the letter of credit was requested:

(a) Sight draft. A copy of this is found in the printed Record (R. 40). This is in the usual form and refers to the letter of credit in question, no reference being made on its face to sugar at all.

(b) The invoice, which is simply a bill made out by Lamborn & Company, and which shows on its face that it is for 1000 bags of Java White Sugar (R. 42).

(c) Order Notify Bills of Lading. These are found among the photostatic copies of the original papers which were certified up to the Circuit Court of Appeals under stipulation and show that they were issued simply for 1000 bags Java sugar, being described as follows:

Car CRI&P	40979	335 Bags wg. 75420 lbs. gross
MSPSM	36470	335 Bags wg. 75620 lbs. gross
TNO	31041	330 Bags wg. 74240 lbs. gross

In addition to these requirements there was also furnished the sworn certificate of Geo. J. Hoffman & Company, Weighers, showing the result of the weighing of "1000 Bags Sugar." (R. 43).

It will thus be seen that with the exception of the invoice which was made out by Lamborn & Company, the parties most interested, and which was entirely self-serving, there was nothing in any of the documents tendered to show that the sugar against which the draft in question was drawn was Java White Sugar, as required by the letter of credit, and the Bank

was certainly not called upon to assume the risk that it was such, in the light of the independent documents thus presented.

This question has come before the Courts on a number of occasions and the principle for which we contend recognized and enforced.

International Banking Corporation v. Irving National Bank, 274 Fed. 122.

It was there held that where the letter of credit issued by a bank required the draft to be accompanied by commercial documents showing that the silk was to conform to a certain design and the stripe was not to exceed 50 per cent of the width of the material, the omission from the documents presented of the required statement concerning the width of the stripe justified the Bank's refusal to pay the draft, since it cannot be required to determine whether such omission has any commercial significance, nor to construe the documents, nor decide arguable questions.

Judge Mayer, in the course of his opinion, says:

> "It would gravely impair the business of issuing letters of credit, if banks were required to construe the documents involved and determine arguable questions. * * *
>
> "The only safe rule for a bank is to refuse to pay, if, by omitting, as here, a distinct and clearly expressed provision, the documents do not conform with the letter of credit."

This case was affirmed on appeal.

> International Banking Corporation v. Irving National Bank, 283 Fed. 103.

Lamborn v. Lake Shore Banking Company, 188 N. Y. Sup. 162.

In this case a quantity of sugar was sold by Lamborn to the Ohio Confection Company of Cleveland, and by the terms of the sale a letter of credit on the Royal Bank of Canada, in New York, was to be issued by the Lake Shore Banking and Trust Company of Cleveland. The letter authorized the payment of $26,-561.92 against bills of lading for "550 bags of Java White Granulated Sugar." The Court said:

> "Under the terms of the letter of credit this draft could only be drawn against the bill of lading for Java white granulated sugar. The bill of lading attached to this draft, therefore, did not comply with the terms of the letter of credit, inasmuch as the sugar described therein was simply 'Java white sugar.' Affidavits are presented on the part of the plaintiff which tend to show that Java white granulated sugar was not only known in the market as Java white sugar, but was the only white sugar shipped from Java. These affidavits are to an extent contradicted upon this points by the affidavits of the defendant. But with this fact the defendant is not concerned. It is clear that the defendant is not under obligation to investigate and ascertain whether the contract between the vendor and vendee has been fulfilled. The only contract which the defendant has made was to honor the vendor's drafts as against the bill of lading for 'Java white granulated sugar.' "

The plaintiff's in the trial court relied upon *Border National Bank v. American National Bank,* 282 Fed. 73. This was a case involving a shipment of sugar under a letter of credit with the usual documents and in which the sugar was correctly described in the bill of lading, but not described in any other document.

This is not the case in the present instance. While

it is true that the invoice, which was prepared by the plaintiffs, contains a description conforming to the letter of credit, this description is not contained in the other documents in the case issued by the independent third parties, in which the merchandise is simply described as "Java Sugar," of which it is well known there are many varieties and grades.

We earnestly contend that it was not incumbent upon the defendant to take the risk that the sugar described in the railroad bill of lading and the official weigher's receipt was of the same character as provided for in the letter of credit, in the absence of any evidence other than the self-serving declaration of the plaintiffs that such was the case.

As very properly stated by Judge Mayer in *International Banking Company v. Irving National Bank* (*supra*), the Bank is not required to construe the documents involved and determine arguable questions, but that the only safe rule is for the Bank to refuse to pay if the documents do not conform to the letter of credit.

VI. THE TRIAL COURT PROPERLY REFUSED TO PERMIT THE PETITIONERS TO RAISE THE QUESTION OF ALLEGED CUSTOM IN CONNECTION WITH THE MEANING OF THE WORD "SHIPMENT."

In view of the comprehensive scope assumed at the first trial in which all available evidence was produced, it necessarily followed that the second trial should have been little more than a formality to comply with the requirements of Federal procedure, but resourceful counsel, realizing their situation, made in their extremity a belated but ineffectual effort to give a differ-

ent complexion to the second trial by amending their notice of motion for judgment by the addition of the following allegations:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co., was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co. That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.,' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by plac-

> ing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

This effort evinces enterprise and ingenuity rather than an appreciation of sound legal principles.

The Circuit Court of Appeals in its first opinion concluded its discussion of the point involved with this significant language:

> "Our examination of the cases which in this country and across the water have put a definite interpretation on the meaning of the word 'shipment' as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from them and is governed by what the Supreme Court there said." 2 Fed. (2) 29.

This language can have but one meaning, and that is, that at the time the letter of credit in question was issued, the general law on this subject as recognized and declared by the highest Courts not only of this country, but of England, was in accordance with the contention of the respondent, namely, that the requirement as to shipment imposed upon Lamborn & Company the obligation of tendering sugar under the contract, which had been shipped during the months of August-September, 1920, from Java in a ship or ships then and there destined for Philadelphia, Pa.

The obvious effect of the amendment which the petitioners attempted to make to their original notice of motion was to vary and contradict the general law in

existence at the time when the contract in question was made, and which had been theretofore recognized and upheld by the Supreme Court of the United States.

It is not necessary to discuss at this point the general subject of amendments to pleadings after a hearing in an Appellate Court. The policy in this regard is liberal, but we have been unable to find any authority permitting an allegation or amendment at any stage of the case when the obvious effect of the allegation or amendment is to contravene a well established principle of law.

This basic principle is as applicable to an original allegation as it is to an amendment. In other words, if the original notice of motion had alleged a custom or undertanding which was contrary to law, it would have been demurrable, and so by the same token, when an amendment is interposed setting up an illegal custom or understanding it should likewise be rejected, not because it is an amendment, but because it attempts to set up a custom or understanding in defiance of law.

To permit those engaged in the Java sugar trade to contravene the decisions of the Supreme Court of the United States by setting up a contrary custom or intention would vest legislative power in private citizens, which would be contrary to public policy.

In *Conn. Fire Insurance Company v. Buchanan,* 141 Fed., at page 884, Mr. Justice Van Devanter, then Circuit Judge, quoted with approval from the opinion in *Glendale Woolen Company vs. Protection Insurance Company,* 21 Conn. 19, as follows:

> "If we have the precise contract which the parties chose to make for themselves, and there be no

> imperfection or ambiguity in the language used to express the meaning of the parties, clearly we have no right to depart from the language, and travel out of the contract, to see if the parties did not, after all, mean something different from what is written. Why, we ask, resort to inferior and secondary evidence, such as inferences from supposed usages or circumstances, or the knowledge or the talk of the parties, at the time of entering into the contract? * * * The rule is well established that when the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages, etc., in order to learn what was intended or to contradict what is written, would be dangerous and unjust in the extreme."

The Circuit Court of Appeals had decided in this case what the parties meant by the language they used, and it followed that it was not permissible to vary the same by the claim of an existing usage or custom to the contrary.

The same principle was recognized by Mr. Justice Sanford, then District Judge, in *Dibert v. Wernicke*, 214 Fed. 682, when he said:

> "And the fact that such sale in respect to the withholding of information as to the pledged property appears to have been conducted in accordance with the custom of the New Orleans Stock Exchange, is not sufficient to render the sale valid; such custom, when applied to a sale made by a pledgee, being in conflict with the rule of law as to

> the measure of care and diligence imposed upon a trustee in selling pledged property, especially when he himself becomes the purchaser."

In *First National Bank of Cincinnati v. Burkhardt*, 100 U. S. 686, Mr. Justice Swayne clearly states the rule as follows:

> "A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelavant and unavailing.
>
> "Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law."

A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, but we have seen no cases, nor do we believe there can be, in which a usage has been permitted to contravene a settled rule of law. The mere statement of this proposition is its strongest refutation. The consequence would be that individuals could defy the courts with impunity, and by agreement or custom establish a drastic and selfish rule contrary to law and equity as declared by the highest courts of the country. In this case it would mean that Lamborn & Company, experienced traders in Java sugar, could invoke a rule against the respondent contrary to that declared by the Supreme Court of the United States.

It may also be in order to observe at this point that the evidence of custom which the petitioners sought to introduce did not pertain to any custom affecting

letters of credit, but had special reference only to customs affecting shipping and marine insurance. Were this class of evidence otherwise unobjectionable, which, for the reasons hereinbefore stated, we are in no sense prepared to concede, it would have been objectionable on the ground that it did not relate to letters of credit at all, but to alleged customs involving other relationships. This distinction is recognized by Circuit Judge Mayer in rendering the unanimous opinion of the Circuit Court of Appeals for the Second Circuit in Old Colony Trust Company v. Lawyers Title and Trust Company, 297 Fed. 157, where he says:

> "Assuming the existence of this custom, it will be noted that it relates to a custom between buyer and seller, and, in any event, is somewhat dependent upon the contract between them. It is not a custom in respect of letters of credit where to repeat, we must always return to the language."

In disposing of this phase of this matter, Judge Rose in his opinion rendered on the second appeal (15 Fed. (2) 473), says:

> "After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things:

'The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a case in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissability because the instrument speaks for itself, does not require the aid of custom to interpret it, and would therefore have to be overruled and refused admission on that account.'

"We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question."

We therefore feel that the action of the Trial Court in striking out the amendment and also in rejecting the depositions in which the custom was attempted to be set up was eminently proper.

VII. CONCLUSION.

We deem it only fair to the Court, as well as to the respondent, that the latter's position in this matter should be understood. Attention is therefore called to the testimony of Mr. Wharton, the Cashier of the National Bank of Commerce, the respondent, (R. 65). He states:

> "The draft drawn against the letter of credit was not paid because our information was that the terms of the credit had not been complied with.
>
> "Q. Why did you decline to pay it? A. You want me to elaborate?
>
> "Q. Tell your reason in full to the jury. A. We had information that the ship on which the sugar was tendered had been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia. We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying.
>
> "We afterwards ascertained that our information on the subject was correct and acting on that information we declined payment. We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of credit."

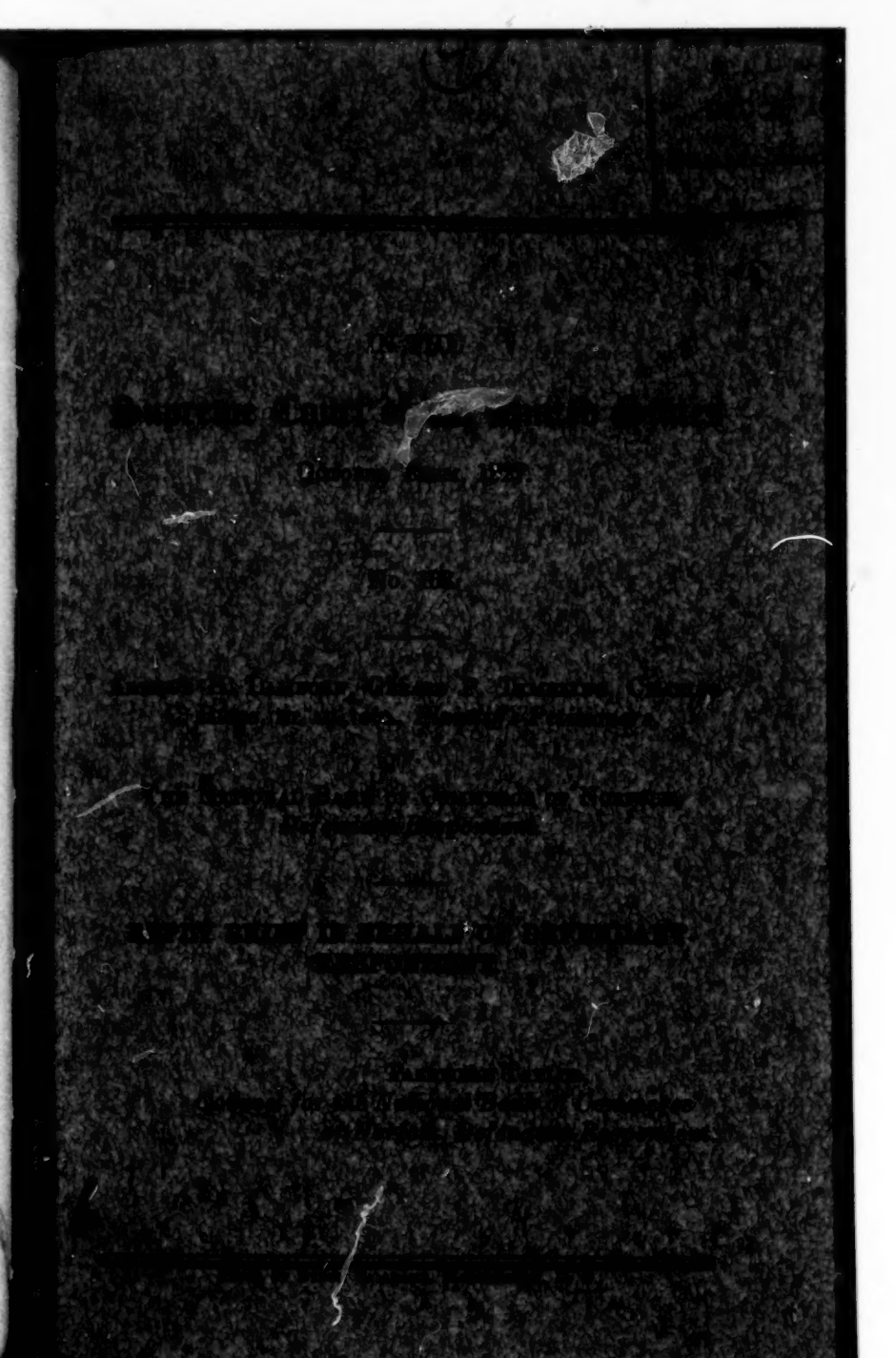
It will thus be seen that the Bank had no interest in this matter, except to live up to the letter of credit, and if it be true that the conditions of that letter of credit were not complied with, it was not only its right but its duty to refuse payment. Anything short of this would have been a gross breach of faith and would

have prevented its recovery over from Southgate and Company of any amount so paid.

For the reasons above given, we feel that the decision and judgment of the Circuit Court of Appeals for the Fourth Circuit in the case at bar are manifestly right and should be affirmed.

Respectfully submitted,

TAZEWELL TAYLOR,
Counsel for the National Bank of Commerce of Norfolk, Respondent.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, ET AL., etc., *Plaintiffs-Petitioners,*

v.

THE NATIONAL BANK OF COMMERCE OF NORFOLK, *Defendant-Respondent.*

REPLY BRIEF IN BEHALF OF DEFENDANT-RESPONDENT.

I. INTRODUCTION.

In the three former briefs which have been filed with this Court by counsel for Plaintiffs-Petitioners, there appears more by way of suggestion than otherwise that reliance may be placed upon a point not directly urged, but which was unsuccessfully urged by Plaintiffs-Petitioners on the second trial of this case in the

District Court and upon the second appeal in the United States Circuit Court of Appeals for the Fourth Circuit. On the second trial the Plaintiffs-Petitioners, who will be hereinafter referred to as the Plaintiffs, endeavored for the first time to prevent the Defendant-Respondent, who will be hereinafter referred to as the Defendant, from relying upon the defense that there was a failure to make shipment during the months of August-September, 1920, from Java by steamer or steamers to Philadelphia, on the alleged ground that in declining to pay the letter of credit, the defendant did not state this as one of the grounds for its declination. This contention of the Plaintiffs was overruled both by the trial court and the Circuit Court of Appeals for the Fourth Circuit on the second appeal.

In order that the Defendant's position may be fully understood if any effort is made to urge this point by the Plaintiffs, this brief is prepared and filed for consideration in that event.

II. THE DEFENDANT WAS ENTITLED TO MAKE THE DEFENSE THAT THE SUGAR TENDERED WAS NOT SHIPPED IN ACCORDANCE WITH THE LETTER OF CREDIT.

The Plaintiffs on the second trial asserted for the first time that the Defendant endeavored to mend its hold by asserting as a defense an objection, which it did not assert or rely upon at the time of presentation and non-payment of the letter of credit. We shall first discuss the facts bearing on this objection before entering upon a discussion of the law. It is our belief that the facts of the case do not call for the application of the principle of law which the Plaintiffs seek to

invoke, and that the principle of law which they seek to invoke, as will be hereafter observed from the authorities, does not justify the conclusion they attempt to draw.

The position of the Defendant throughout has been thoroughly consistent. It now claims and has always claimed both in its pleadings filed in May, 1921, and on both trials of this case, and on both hearings on appeal, as well as on the present hearing, that the Plaintiffs failed to live up to their contract.

A copy of the letter of credit is found on page 106 of the Record. It concludes with this significant language:

> "If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected."

On December 27, 1920, the Bankers Trust Company wired The National Bank of Commerce (R., 139):

> "Lamborn has presented draft and documents covering 1000 bags sugar under your credit 105 account Southgate. Documents apparently in order. Have you arranged examine documents. Please wire."

To which the National Bank of Commerce replied on December 27, 1920 (R., 143):

> "Answering telegram we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eighth calling at Mascassar then Borneo and finally back to Samarang

from whence sailed for New York October seventeenth further that this ship was diverted to Philadelphia though originally intended for New York our credit specifically calls for shipment from Java August or September and Lamborn's failure to comply with this important requirement compels us refuse payment moreover our client has shown us letters indicating their sugars loaded on steamer Chifuke Maru which has never arrived."

On January 4, 1921, The National Bank of Commerce wired the Bankers Trust Company (R., 145), as follows:

"Replying to telegram are advised that terms of credit in favor Lamborn and Company not complied with. We decline payment."

On January 5, 1921, the Bankers Trust Company wrote Lamborn & Company (R., 145), in part, as follows:

"Please be advised that we have received a wire from the National Bank of Commerce, Norfolk, Va., advising us that they decline to make payment under the above credit. As under this credit we are only the paying agents of the National Bank of Commerce in Norfolk, we are obliged to follow their instructions and are returning to you documents covering a shipment under this credit tendered to us in your letter of December 23, 1920.

We suggest that you take the matter up directly with the National Bank of Commerce, Norfolk."

There is nothing in the record to indicate that this suggestion to take the matter up directly with the National Bank of Commerce was ever followed by Lamborn & Company.

On January 6, 1921, the Bankers Trust Company

telegraphed the National Bank of Commerce (R., 146) as follows:

> "Judge Burrough has vacated the order enjoining payment against presentation of documents under your credit number one hundred five order will be entered today to that effect please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarassing to yourselves and ourselves."

To which the National Bank of Commerce replied on January 7, 1921 (R. 146), as follows:

> "Southgate advises that expressed conditions of our credit number one hundred five have been grossly violated by sellers and declines to recognize payment of same in light of your repeated statements that you only acting as paying agent we cannot understand why you should feel embarrassed we reaffirm position outlined in our telegram January fourth to you."

On January 8th, 1921, the Bankers Trust Company wrote the National Bank of Commerce in part (R., 146), as follows:

> "In accordance with our exchange of telegrams of January 6th and 7th, we have advised Lamborn & Company of your refusal to permit payment of their draft on us under the above credit for $48,009.81, covering shipment of sugar to T. S. Southgate & Company."

In the protest of the draft (R. 147), it is shown that the answer accompanying the refusal was "will not pay." It will thus be seen from the entire correspondence that the refusal to pay the draft or the letter

of credit was placed upon the ground that the Plaintiffs had violated their contract. In the letter of January 5th from Bankers Trust Company to Lamborn, the latter were advised that The National Bank of Commerce declined to make payment of the letter of credit, and the Bankers Trust Company suggested that Lamborn take up the matter directly with the National Bank of Commerce, which was never done.

Throughout the correspondence between the National Bank of Commerce and the Bankers Trust Company there are repeated statements to the effect that Lamborn had not complied with the terms of the letter of credit. In addition to these general statements in the telegram of December 27, 1920, from the National Bank of Commerce to Bankers Trust Company (R. 143), the specific objection among others is stated:

> "That this ship was diverted to Philadelphia though originally intended for New York."

N. Nelson Keen, a member of the firm of Lamborn & Company, testified at both trials. On the first trial when this question was not raised by the Plaintiffs, he testified as follows (R. 45):

> "On January 6th, 1921, I went to the Bankers Trust Company and saw Mr. Kent, a Vice-President, and also Mr. Smith, a Vice-President. I pointed out to Mr. Kent that the injunction against this letter of credit had been vacated by a court order and the documents were now in order for payment under the letter of credit. We had some little discussion there about it, the exact words of which I don't remember, but Mr. Kent told me that they had been instructed by The National Bank of Commerce of Norfolk, Va., not to pay the

> credit and as they were only the paying agents and had not confirmed the credit to us, they would have to abide by the instructions received from The National Bank of Commerce, their principal, and after that discussion I went back to our office."

On the second trial when this question was for the first time raised, Mr. Keen again testified, and, for the first time, and, then only when having omitted reference to the matter on his principal examination, did he, when recalled to the stand near the close of the second trial, state that only the question of clearance had been brought up during the conversation on January 6th, 1921, and that his firm had relied upon that alone in their subsequent conduct with reference to the matter. (R. 154.)

This conclusion is hardly borne out by the subsequent testimony of Mr. Keen, for he conclusively shows that all other sugar, which might have been tendered on account of the Southgate contract, was already covered by other contracts with other parties, and that these other parties took and paid for every bag thereof (R. 154, 155). Consequently the Plaintiffs have sustained no damage, because they had no sugar available which could have met the requirement raised by the Defendant's construction of the letter of credit.

But beyond all this, a party to a suit is not permitted upon a second trial to take a position inconsistent with that taken by him on the first trial. The record bears out the statement that Mr. Keen, one of the Plaintiffs, was perhaps the most important witness testifying on their behalf. It was he who conducted the negotiations with the Bankers Trust Company, and

it is but reasonable to suppose that if the ground of non-payment as assigned by the Bankers Trust Company had gone only to the question of clearance, he would have recalled the same and mentioned it in his first testimony when the matter was clearer in his mind. There is nowhere in the record of the first trial any testimony of Mr. Keen or anyone else that the refusal to pay was placed upon any one specific ground in such a manner as to preclude the urging of others.

We, therefore, feel that the Plaintiffs having lost on their original position, which was that they had complied with their contract, should not now be permitted to mend their hold by urging an additional ground, which was never mentioned on the original trial, in spite of the fact that most thorough and complete testimony was given at that trial as to every branch of the case. We believe that an effort of this kind by one of the parties to the litigation is tantamount to an inconsistent position. The Court and jury on the former trial had every reason to assume that every branch of the case had been thoroughly developed in the Plaintiff's testimony, including certainly the reason, if it were given, why the letter of credit was not paid.

We would call the attention of the Court to the opinion in *Smith v. Boston Elevated Ry. Co.*, 184 Fed. 387, and especially the following quotation therefrom:

> "In the present case, the Plaintiff upon the former writ of error had a full hearing upon the question of her legal rights upon the state of facts upon which she rested before a jury and before this court. If, after an adverse decision of this court she is at liberty to change her own testimony at will, then there is no practical limit to litigation."

It will thus be seen that there has been no effort on the part of the Defendant to mend its hold. In answer to the Plaintiffs' notice of motion for judgment, and long before the first trial, the Defendant pleaded the general issue and stated as one of its grounds of defense that the shipment had not been made from Java to Philadelphia in accordance with the terms of the letter of credit. (R. 4.)

Under the Virginia practice, which is applicable to this case under the terms of the Conformity Act, even though the Defendant had stated no grounds of defense, it was still incumbent upon the Plaintiffs to prove their case, which would have necessarily required proof that shipment was made in accordance with the terms of the contract. If the Plaintiffs had failed to do this, without any action on the part of the Defendant, their case would have failed from its inherent weakness. The same consequence follows when, at the end of the Plaintiff's case, a motion is made for a directed verdict. At that point the Defendant had introduced no evidence at all. It had up to that point relied upon no affirmative defense; it stood upon its rights, with the burden on the Plaintiffs to establish a case before it was called upon to interpose any defense.

That the present position of the Plaintiffs is an after-thought is amply shown by the record. This litigation was started by a notice of motion for judgment filed by the Plaintiffs on April 7th, 1921, and trial was had resulting in a directed verdict for the Plaintiffs. To the judgment then entered a writ of error was granted by the Circuit Court of Appeals, and on appeal the judgment of the lower Court was reversed and the case sent back for another trial, which was held on June 5, 1925, or over four years after the

original institution of the action, and it was not until the latter date, namely, June 5, 1925, that the present question was ever raised by the Plaintiffs.

These Plaintiffs are astute business men, they are represented by capable counsel, who have specialized in litigation of this description, and it is only justice to these gentlemen to say that had there been any merit in the point now urged, or had the interest of their clients been jeopardized by the Defendant's action, they would hardly have waited four years and two months, and only then after they had failed in their original theory of the case, to have brought the matter to the attention of the Court, when their conduct of this litigation displays their experience, capability and comprehensive grasp of every essential involved.

Judge Groner, who presided at both trials, concluded that the Plaintiffs had sustained no injury by reason of any act of the Defendant; that the Defendant was not engaged in an effort to mend its hold, and that its position had been consistent throughout. He said (R. 163):

> "Now, the Plaintiff urges that there is a new element in this case, introduced by the production of the letter passing between the defendant Bank of Commerce and the Bankers Trust Company of New York which is described in those letters as the paying agent of the local bank. I have carefully listened to those letters, the contents of them and the point urged by counsel for the Plaintiff that there was an election of remedies and rights, that the Defendant in denying the compliance with the contract or carrying out of the contract put the ground upon something other than the ground it now urged in its defense. I don't think the letters bear that construction. I don't think it is possible to give them that slant. I think they are

clearly not susceptible of any other conclusion than that while other grounds of defense were urged as a justification for refusal to accept the sugar, the ground now urged was among those and there is no limitation or selection or election of a particular defense and a waiver of all others, so that in the view that I now take of this case, the situation is as it was at the last trial plus the authoritative declaration of the Circuit Court of Appeals that what admittedly was done was not a compliance with the terms of contract. So that it becomes my duty in this case at this time, under those circumstances, to grant the motion of the Defendant's attorney for an instructed verdict in favor of the Defendant."

The point was subsequently urged in the United States Circuit Court of Appeals on the second appeal, and Judge Rose disposed of it in the following language (R. 207):

"The Plaintiffs say that Defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the Defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what Defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The claim of the Plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while Plaintiffs insist that Defendant may not amend or supplement its out of Court statement of

its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the Plaintiffs treated the defense in question as properly before the Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the Defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made."

III. EVEN THOUGH PLAINTIFFS COULD HAVE OBJECTED TO DEFENDANT'S GROUND OF DEFENSE WHEN ORIGINALLY MADE IT WAS TOO LATE SO TO DO ON THE SECOND TRIAL.

As hereinbefore shown the defense that the Plaintiffs had not complied with the terms of the letter of credit was formerly pleaded prior to the first trial. This defense was stated in writing and was first filed on May 3, 1921. Thereafter on October 23, 1923, a supplemental statement of the grounds of defense was filed in the following words (R. 3):

"5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

'Shipment to be made during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia.'

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship 'West Cheswald,' whose destina-

tion at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the Plaintiffs on December 13th, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia."

Thereafter the first trial was had in which no objection was made by the Plaintiffs to the Defendant relying upon this ground of defense, it being assumed by the Plaintiffs, in which assumption they were sustained by the Court in directing a verdict in their favor, that the defense was not a valid one. On appeal the lower Court was reversed, and it was held that the defense was valid. During all of this time the Defendant's right to interpose this defense was never raised, though the record was as comprehensive and complete, if not more so, than it was on the second trial. It was not until the day of the second trial in June, 1925, that the Defendant's right to rely upon this defense was ever questioned by the Plaintiffs.

Our contention, therefore, is that upon the first trial the action of the Court, in determining that the defense relied upon by the Defendant was not a valid one, necessarily comprised the question of the right to make it, nothing being said to the contrary, and certainly the action of the Circuit Court of Appeals on the first appeal, in holding that the defense was a valid one, necessarily embodied the conclusion that the Defendant had not estopped itself from making it, especially in view of the fact that the Plaintiffs raised no objection on that ground.

The pleadings and the evidence on the former trial

permitted the making of this objection to this defense as completely as the record in the present instance, and yet it was not made.

A party to litigation will not be permitted to make his case by piecemeal, especially when he has been disappointed in the position he has taken on the first trial.

This position is succintly stated in *Sun Company vs. Vinton Petroleum Company,* 248 Fed. 625:

> "The writer understands that questions which by an appeal have been brought before an appellate court for its decision cannot again be insisted on when the case comes before the same court on a subsequent appeal; that a party cannot create an exception to this rule by calling to the attention of the appellate court, when the case is first before it, some only of the questions which the record presents for its decision, reserving other questions, also presented by the record, for a second presentation to the trial court in the event of the remandment of the case to it, or to the same appellate court on a subsequent appeal; and that a subsequent appeal brings up nothing but the proceedings subsequent to the mandate."

There can be no question but that the point now raised might have been adjudicated on the former hearing; that being true there must be some end to this litigation, and the Plaintiffs are necessarily foreclosed by the former decision.

In *Burns vs. Cooper,* 153 Fed. 151, Mr. Justice Van Devanter, then Circuit Judge, in a somewhat similar case, said:

> "As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has

> jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and ever question which might have been then raised in opposition to the decision, *res judicata* between the parties to it as respects the claim or cause of action there litigated."

In *Roberts vs. Cooper*, 20 How. 481, 15 L. Ed. 973, the Court said:

> "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation."

In the case of *United States Trust Co. vs. New Mexico*, 183 U. S. 535, 46 L. Ed. 315, 22 Sup. Ct. Rep. 172, Mr. Justice Brewer, speaking for the Court, said:

> "The District Court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this Court of such order is an adjudication that, upon the face of the petition, a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made, but also against those which might have been made."

In *New Mexico vs. Board of County Commissioners*, 22 N. M. 562, 166 Pac. 906, 1 A. L. R. 720, it is said:

> "In fact, the overwhelming weight of authority is to the same effect, and, were this not the rule, it would be possible for a party objecting to a complaint or answer, or other pleading, on various grounds, to split up his grounds of objection, and have the same determined by the appellate court by piecemeal, and litigation would never be brought to an end."

If additional authority is needed for this principle, particularly so far as the uniform rule followed in the Federal Courts is concerned, reference is made to the note in 1 A. L. R. 725, *et seq.*, in which the rule is thus stated:

> "The general rule, supported by the great weight of authority, is to the effect that questions which might have been, but were not, raised or presented on a prior appeal, or error, will not be considered on a subsequent appeal, or error; or, in other words, that, where the prior judgment was on the merits, nothing is before the court on a subsequent appeal, but the proceedings subsequent to the first mandate, all matters occurring prior thereto, and which could have been adjudicated on the former hearing, being regarded as controlled by the 'law of the case' rule."

It was, therefore, too late for the Plaintiffs to question on the second trial the Defendant's right to interpose this defense to the action.

IV. THE RULE OF LAW INVOKED BY PLAINTIFFS IN ERROR BEING FOUNDED ON ESTOPPEL IS NOT APPLICABLE UNDER THE FACTS OF THIS CASE.

The Plaintiffs take the position that the Defendant, having, as they claim, assigned but one objection as a

ground for refusing to pay the letter of credit, is confined to that ground in the trial of the case. For the reasons we have heretofore given, we believe that the rule cannot be invoked by the Plaintiffs in error, but we further feel, even though it could be invoked at this time, the Plaintiffs not having been misled to their detriment by the Defendant's conduct, the Defendant would not be precluded from urging any additional grounds of objection.

Plaintiffs cite the case of *Railway Company vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, in which the Court uses the following lnaguage:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

It will be seen that the Supreme Court bases this rule entirely upon the idea of estoppel, and it is needless to say that a person can only invoke this doctrine when he has suffered damage.

The case of *Everett vs. Saltus,* 15 Wend. 474, cited in Railway Company vs. McCarthy, (*supra*) well illustrates this element of equitable estoppel. It was there held that a party, who upon being called upon to account for goods which had come to his hands, set up title in himself independent of a lien, could not afterwards when an action was brought against him defeat a recovery by setting up at the trial a right to retain the goods on the ground of a lien. This conclusion was thoroughly sound, as it would not be permissible for a

party to occupy inconsistent positions through the course of litigation. Even assuming for the sake of argument that the Plaintiffs were not advised at the time of the presentation of the draft of all of the reasons which might have been urged for not paying the same, this would not preclude the Defendant from setting up additional reasons at the trial, provided they were not inconsistent with the original reasons, if the Plaintiffs had not been misled to their detriment by treating the original reason assigned as the only one for not carrying out the contract.

The Supreme Court of the United States in *Bierce vs. Hutchins,* 205 U. S. 340, 51 L. Ed. 828, lays down the rule as follows:

> "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt."

There is nothing inconsistent in a defense based upon an alleged failure of the vessel to clear at a certain time, and another defense based upon the fact that the vessel's destination at the time of sailing was not the port contemplated by the contract.

In *Campbell vs. Fetty,* 271 Fed. 673, the Court recognizes and applies the rule for which we contend, saying:

> "An estoppel also presupposes liability, and that the party relying upon it has been misled into such action that he will suffer injury, if the estoppel is not declared. 10 R. C. L. 697. The case of *Railway Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, relied upon by Plaintiff in error, is not in point. The doctrine of that case forbids a litigant

to mislead his adversary by basing conduct upon one ground and then defending upon another."

United Cent. Life Ins. Co. vs. Drake, 214 Fed. 547, states the rule in this language:

"Nor was it a fatal objection to the insurance company's maintenance of its lien for the $10,080 upon the surplus fund by subrogation that it had endeavored to collect this amount by the foreclosure of its mortgage of December 20, 1907, and had been defeated by the bankruptcy of McKillip. The rule available in some circumstances, that where a Defendant has given a specific reason for his refusal to perform his contract or discharge his duty may not, after suit has been commenced to compel his performance in reliance upon his statement of his reason, change his position and successfully defend on another ground (*Railway Company vs. McCarthy,* 96 U. S. 258, 267, 24 L. Ed. 693; *Ballou vs. Sherwood,* 32 Neb. 666, 690, 49 N. W. 790, 50 N. W. 1131; *State vs. Board of Commissioners,* 60 Neb. 566, 570, 83 N. W. 733), is not applicable to this case: First, because it is founded on an equitable estoppel, and while the insurance company brought a futile suit to foreclose the mortgage of December 20, 1907, the record fails to convince that it ever specified or misled the trustee into the belief to his injury that that mortgage was the only reason it would not surrender the three forties; second, because the rule is inapplicable to cases where the party against whom it is invoked has independent affirmative causes of action and remedies for the wrong it has suffered; and, third, because the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating

an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory."

In *Second National Bank of Allegheny vs. Lash Corporation,* 299 Fed. 372, the Court in discussing the McCarthy case, says:

"Viewing this statement as the whole of the rule, and regarding the principle of waiver as its basis, some courts have held that where a party justifies his conduct on a ground specifically stated he is deemed to have waived all other grounds, and there the matter ends. This may be a correct interpretation of the quoted expression, but this expression is not the whole of the rule. Having said that a party cannot change his ground after litigation has begun, the court, giving the reason for the rule, continued:

'He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold vs. Bank,* 8 Wend. (N. Y.) 562; *Holbrook vs. White,* 24 Wend. 169; *Everett vs. Saltus,* 15 Wend. 474; *Wright vs. Reed,* 3 Durnf. & E. 554; *Duffy vs. O'Donovan,* 46 N. Y. 223; *Winter vs. Coit,* 7 N. Y. 288.'

"The concluding words clearly indicate that the rule is founded on equitable estoppel. *Insurance Co. vs. Drake,* 214 Fed. 536, 547, 548, 131 C. C. A. 82. Accordingly, when a party, with full knowledge of the facts, as here (*Goodman vs. Purnell,* 187 Fed. 90, 109 C. C. A. 408; *Banco Nacional vs. Bank* (D. C.) 289 Fed. 169, 176), has selected and given one of several available reasons for his refusal to perform his contract or discharge his duty and after suit changes his position and seeks to rely upon the others, federal courts in this circuit, looking to the reason of the rule and keeping in mind the distinction between waiver and estoppel

(*Shaw vs. Spencer,* 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115), examine the record to find whether it appears that the party has misled his adversary or induced him to alter his position to his prejudice or has himself reaped an advantage by failing seasonably to assert the defense subsequently made—in other words, whether the facts raise an estoppel."

Galla vs. Hamburg, 233 Fed. 425, 426, recognizes the same principle:

"There is one point advanced requiring further consideration. It is contended that because the Defendant, when presented with Plaintiff's demand (nearly a year before action brought), declined settlement in a letter containing the suggestion (it was no more) that the loss complained of resulted from sea water, therefore Defendant is estopped from defending in this suit on the ground that it was a fresh-water tank that by leakage injured cargo. Undoubtedly a part of the general rule is as stated in *Railroad Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, that:

'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration.' This court has considered the decision just cited in *Goodman vs. Purnell,* 187 Fed. 94, 109 C. C. A. 408, and the subject in *Burton vs. Berthold,* 166 Fed. 416, 92 C. C. A. 168. See also *Hine vs. New York, etc., Co.,* 73 Fed. 852, 20 C. C. A. 63. In each of these cases we have expressly or impliedly insisted upon the reason of the rule being apparent in order to justify its application." * * * "Estoppel *in pais* only arises from such acts and declarations as by reasonable intendment induce another to alter his position injuriously to himself, or enable the first party to reap a personal benefit from what was said

or done. This case falls far short of measuring up to the rule. There is no evidence that Plaintiff relied upon the statement made, or changed his position by reason thereof of which perhaps the best evidence is the form of the complaint, which assigns an act of negligence having no necessary or apparent relation to water, either fresh or salt."

Quinn vs. Olsen, 298 Fed. 708, is also in point:

"Plaintiff contends, however, that the Defendant because of his statement made at the time of the tender is precluded from urging this failure as a defense.

In the case of *Railway Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693, the Supreme Court of the United States said:

'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.'

"This principle of law is well settled, but it has no application in the instant case. Defendant in effect said because of the delay he had theretofore burned up his contract and notified the agent, and that after this long delay he should not be called upon to take the land when it had depreciated greatly in value. Defendant was not a lawyer, and he was not called upon to couch his refusal in legal phraseology. What he said was not susceptible of the construction that he refused to accept solely because of the depreciation of the value of the land, and was not inconsistent with the defense of failure to perform within a reasonable time."

We will conclude this branch of the discussion with the following quotation from the opinion in *Ketchum vs. Duncan,* 96 U. S. 659, 24 L. Ed. 868:

"Moreover, it is necessary to notice who sets up this plea of estoppel. An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

It will thus be seen from these well reasoned cases that the person setting up the alleged estoppel must show that the several positions taken by the opposing party were either inconsistent, or that reliance has been solely placed upon the first reason given, and that to permit other reasons to be afterwards given would cause damage to the party invoking the estoppel.

This rule, therefore, can have no application in the present instance, even though it had been seasonably invoked, and even though it might have been concluded by the jury that the question of clearance was the sole ground relied upon at the time payment of the letter of credit was refused, for the reason that the Plaintiffs were unable to take any step or to do any act that would have cured the objection as to the method of shipment.

An effort was made by Mr. Keen in his testimony (R. 154) to show that the required number of bags of sugar could have been delivered to Southgate & Company from the cargo of the "Washington Maru," but on cross-examination this effort completely fails. He said:

"I know what disposition was made of the entire cargo out of the 'Washington Maru.' The American Stores, Philadelphia, had 7,250 bags of the cargo of the 'Washington Maru,' the McMahon & Leib Company of Anderson, Indiana, had 400 bags. The Gammeter Commercial Company, 1,000 bags. A. Blanton Grocery Company, 1,100 bags; Jesse C. Stewart 281 bags, making a total of 9,931 bags. My recollection is that the balance of the

number of bags were used for filling, sweeping, etc.

It is a fact that disposition was made at Philadelphia of the entire sugar cargo of the 'Washington Maru,' that disposition was made pursuant to previous declarations of that sugar in the 'Washington Maru,' substitutions finally from the 'Chifuku Maru' from the 'Washington Maru.'

Q. So when the 'Washington Maru' landed on December 19th all of that sugar by reason of substitutions and designations had been allocated to the parties whose names you have read?

A. I don't say that it had because a great number of these people had objected to the substitution of the 'Washington Maru' for the 'Chifuku Maru' and wanted us to leave the sugar on the 'Chifuku Maru.'

Q. But it was finally taken by them, was it not?

A. Yes.

Q. Pursuant to these substitutions and designations?

A. Yes, sir.

Q. And that disposed of your entire cargo out of the 'Washington Maru?'

A. Yes, sir."

It thus appears that Mr. Keen knew the disposition that was made of the entire cargo of the "Washington Maru"; that all of this cargo was delivered to other customers of the Plaintiffs pursuant to contract, and that the same was paid for; that the "Washington Maru" arrived on December 19th, three days after the "West Cheswald," and that immediately upon her arrival tender was made of her entire cargo to the various parties named as subsequently taking it, and that this tender was kept alive from the time of the ship's arrival until the time of the delivery of the sugars to the various parties to whom they had been previously tendered; that previous to the arrival of the

vessel declarations of this sugar had been made, and that the sugar finally delivered to the various parties under their contracts was delivered pursuant to previous declaration, and pursuant to tender upon arrival of the vessel. It will thus be seen that the sugar out of the "Washington Maru," being the only sugar available, which complied with the terms of the letter of credit, so far as shipment was concerned, was all preempted prior to the arrival of the vessel at Philadelphia, and consequently, there was no way whereby the Plaintiffs could have used that sugar to meet the objection as to shipment, which applied to the cargo in the "West Cheswald."

Mr. Keen further states that the delivery of this sugar to Southgate & Company instead of to the parties with whom his firm had contracts would have made no difference in the final result, but would have simply changed the individuals, who finally received the sugar. (R. 158)

It will thus be seen that even though the evidence justified the conclusion (which it does not) that the exclusive reason given for not paying the letter of credit was based upon the question of clearance, still it conclusively follows that the additional reason even though subsequently urged for the first time (which we deny) is not inconsistent with the first reason, nor has it in any manner affected the Plaintiffs to their detriment. Therefore the rule is not applicable.

Respectfully submitted,

TAZEWELL TAYLOR,
Counsel for the National Bank of Commerce of Norfolk, Defendant-Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1927.

Arthur H. Lamborn et al., Petitioners, *vs.* The National Bank of Commerce of Norfolk, Virginia.	On Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 9, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought in the federal court for eastern Virginia by Lamborn & Company, of New York City, against The National Bank of Commerce of Norfolk. The jurisdiction of the District Court rested upon diversity of citizenship. The plaintiffs sought damages for the refusal to honor a sight draft drawn against a letter of credit, given pursuant to a contract of T. S. Southgate & Company to buy 1,000 bags of Java white sugar at 22 cents per pound less 2%, duty paid, f. o. b. Philadelphia, landed weights. Payment was to be made in New York City upon presentation of sight draft with invoice and railroad order notify bill of lading attached. The letter of credit provided: "Shipment to be made during August/September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The sugar tendered had been shipped on the West Cheswald, a steamer which sailed from Java on September 30, and by a continuous voyage arrived in Philadelphia on December 16. Then followed promptly the discharge of 1,000 bags of sugar; the ascertainment of the net landed weight; the payment of the duty; the shipment free on board railroad cars at Philadelphia of the specified quantity of sugar to T. S. Southgate & Company; the drawing against the letter of credit of a sight draft for the purchase price, $48,009.81; its presentation, together with the appropriate shipping documents, for payment; and the refusal to honor. All this was done long before the expiration of the letter of credit. Between April 23, 1920, the date of the contract, and the tender of the sugar, the market price had fallen 11 cents.

The Bank claimed that the sugar tendered failed to satisfy the requirements of the contract, because it had come, not on a steamer which had been continuously destined from Java to Philadelphia, but upon one which, originally destined from Java "to Port Said, option New York," was diverted by the charterers to Philadelphia, while on the high seas. The West Cheswald, had sailed by a direct route from Java to Philadelphia, the diversion having been made while she was near Bermuda, about three days from port, so that she could pursue the same route to Philadelphia as if she had at all times been destined for that port. In fact, another steamship bearing sugar shipped by plaintiffs—the Washington Maru—which sailed from Java two days earlier and had at all times been destined to Philadelphia, arrived there three days after the West Cheswald. The case was tried twice before a jury. The only question in serious controversy was one of construction—the meaning to be given to the clause in the letter of credit quoted above. At the first trial both parties requested a directed verdict. The verdict was directed for the plaintiffs. The Court of Appeals reversed the judgment entered thereon and ordered a new trial. 2 F. (2d) 23. At the second trial, the presiding judge, applying the rule declared by the appellate court, directed a verdict for the defendant. The judgment entered thereon was affirmed by the Court of Appeals, 15 F. (2d) 473. This Court granted a writ of certiorari, 273 U. S. 688, because of conflict with cases decided by the Circuit Court of Appeals for the Second Circuit, *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn* (and other cases), 276 Fed. 325, 10 F. (2d) 697, certiorari denied, 271 U. S. 683, 685, 686.

The defendant is obviously not liable unless there was a tender of sugar which met the requirements of the letter of credit as to amount and quality of the sugar, as to the time, *Norrington* v. *Wright*, 115 U. S. 188, and the place, *Filley* v. *Pope*, 115 U. S. 213, of shipment; and as to the manner of shipment and the ultimate destination.[1] The clause "shipment by Steamer or Steamers to Philadelphia" states the manner of shipment and the ultimate

[1]Compare Bowes v. Shand, 2 App. Cas. 455; Ashmore & Son v. Cox & Co., [1899] 1 Q. B. 436; Landauer & Co. v. Craven & Speeding Bros., [1912] 2 K. B. 94; Hansson v. Hamel & Horley, Ltd., [1922] 2 A. C. 36; Merchants Bank v. Griswold, 72 N. Y. 472; Bank of Montreal v. Recknagel, 109 N. Y. 482; Mora y Ledon v. Havemeyer, 121 N. Y. 179; Iasigi v. Rosenstein, 141 N. Y. 414.

destination. Compliance with its provisions was confessedly a condition of liability. The Bank contends that there was not a compliance because the sugar tendered did not come by a steamer which at all times since leaving Java was destined to Philadelphia.

We find nothing either in the words of the letter of credit, in the custom of the trade, or in reason, which justifies implying the condition that, from the inception of the voyage, Philadelphia must have been the destination intended. The transaction is not like the ordinary contract for goods to be shipped. It is not like the common c. i. f. contract for shipment from a foreign to an American port, where delivery to the ship at the port of lading is delivery to the purchaser. Nor is it like those contracts where shipment is to be made by a named vessel. Here, the contract was for a sale f. o. b. cars Philadelphia—and the buyer was not to acquire any interest in the sugar, legal or equitable, until so delivered. Thus, the contract resembles that involved in *Filley* v. *Pope*, 115 U. S. 213, upon which the Bank relies. But the question for decision here is an entirely different one. There the contract of sale provided for a "shipment from Glasgow." The meaning of the words used was clear; the question was as to their legal effect. Was shipment from Glasgow a condition? This Court held that it was. Here it is admitted that the term "shipment from Java by Steamer or Steamers to Philadelphia" is a condition. The only question is whether that phrase means not merely that the sugar must be shipped by steamer from Java to Philadelphia, but also that the steamer which carried it must, from the inception of the voyage from Java, have been continuously destined to Philadelphia. No such requirement is stated in the contract. While the original letter of credit had required the seller to furnish a copy of the "Ocean Bill of lading covering shipment Java to Philadelphia", that requirement had been eliminated on the seller's representation that compliance with it would be impracticable under the form of shipment contemplated; and its inclusion in the letter must be deemed to have been inadvertent. As was said in *Harrison* v. *Fortlage*, 161 U. S. 57, 63: "The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

The plaintiffs were entitled to a directed verdict. The conclusion which we have reached is in accord, not only with that reached

by the Circuit Court of Appeals for the Second Circuit, but also with that of the state courts which have had occasion to construe the same provision in other contracts of Lamborn & Company made under like circumstances.[2] As the letter of credit is complete in itself, we have no occasion to consider the terms of the contract between Lamborn & Company and T. S. Southgate & Company, or the circumstances which led to the diversion of the West Cheswald to Philadelphia, which counsel have discussed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2]H. O. Wilbur & Sons, Inc., *v.* Lamborn, 276 Pa. 479, 487; Williams Ice Cream Co., Inc., *v.* Chase National Bank, 120 N. Y. Misc. 301, 210 App. Div. 179; J. Hungerford Smith Co. *v.* Lamborn, 200 N. Y. Supp. 292; Telling Belle Vernon Co. *v.* Lamborn, N. Y. Law Journal, December 22, 1920; Pennsylvania Milk Products Co. *v.* Lamborn (and other cases), N. Y. Law Journal, January 4, 1921. See also Central Sugar Co. *v.* Lamborn, 200 N. Y. Supp. 499, 195 App. Div. 909; Lamborn & Co. *v.* Log Cabin Products Co., 291 Fed. 435; Lamborn *v.* Hardie Co., 1 F. (2d) 679.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1927.

Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, et al., etc., Petitioners, *vs.* The National Bank of Commerce of Norfolk, Virginia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 9, 1928.]

Mr. Justice Stone, dissenting.

I think the judgment below should be affirmed. I cannot agree that a condition in a commercial letter of credit, that drafts are to be drawn against merchandise "shipment . . . from Java by Steamer or Steamers to Philadelphia" is satisfied by a shipment "from Java to Port Said, option New York", even though the cargo ultimately reaches Philadelphia. I had supposed, as the opinion below seems to me to show, that the character of a shipment is fixed at the time it is made, and hence that language in a mercantile contract indicating that a shipment is to be made from one point to another could only mean that the point of destination is to be known and specified at the time of shipment. *Hannson* v. *Hamel & Horley, Ltd.*, [1922] 2 A. C. 36; *Landauer & Co.* v. *Craven & Speeding Brothers*, [1912] 2 K. B. 94; *Mora y Ledon* v. *Havemeyer*, 121 N. Y. 179; *Iasigi* v. *Rosenstein*, 141 N. Y. 414, 417.

But even if this were doubtful as a general proposition, there would seem to be no room for doubt in the present case. Here the letter of credit specified that drafts when presented should be accompanied by "copy of ocean bill of lading covering shipment Java to Philadelphia." Obviously such a bill of lading would be impossible unless the shipment were continuously destined for Philadelphia. It is true that, for the convenience of the seller the bank, at the buyer's direction, later waived physical presentation of a copy of the ocean bill of lading. But the record does not show that the bank had any reason to suppose that the require-

ment had originally been inserted in the letter of credit by mere inadvertence; so far as it was aware, there was still to be an "ocean bill of lading covering shipment Java to Philadelphia," but the seller was to be excused from presenting it. The clause "shipment . . . from Java by Steamer or Steamers to Philadelphia" was not waived and its meaning on the date of presentation of the draft remained the same as when the credit was issued. The provision in the letter of credit that "conditions embodied in this credit must be adhered to, otherwise payment will not be effected", only expresses the rule, with which we all agree, that liability upon a mercantile contract may be established only by strict compliance with its conditions. *Filley* v. *Pope*, 115 U. S. 213; *Norrington* v. *Wright*, 115 U. S. 188; *Bowes* v. *Shand*, 2 App. Cas. 455.

Mr. Justice McREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice SANFORD join in this dissent.